Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DAVID LAWRENCE SOLOMON,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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January 23, 2001

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QUESTION PRESENTED

85 days after *Solomon's*[1] rehearing was denied, the *Vernell*[2] footnote admitted that *Solomon* was unconstitutional and repudiated *Solomon*. Unopposed expert testimony by former judges[3] of the highest courts of Florida and New York concluded that the *Vernell* footnote admitted that *Solomon* was unconstitutional and repudiated *Solomon*. Thereafter, in the one and

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[1] *Florida Bar v. Solomon*, 711 So.2d 1141 (Fla.1998).

[2] Footnote 1 in *Florida Bar v. Vernell*, 23 Fla.L. Weekly S442, 444 (Fla.1998) is the only footnote in this advance sheet decision. The *Vernell* footnote is found on page 7 of this petition. The *Vernell* footnote was revised and then omitted from the official reporter, but the result dictated by the *Vernell* footnote was not changed. The *Vernell* footnote was revised and omitted from the official reporter after the *Vernell* footnote was argued to this Court in the rehearing of *Solomon v. Florida Bar*, 119 S.Ct. 411 (1998), USSC case number 98-425 as having repudiated *Solomon*. Revision and omission of the *Vernell* footnote to protect the Supreme Court of Florida from justice rather than to advance justice was an intentional abuse of judicial power.

[3] Former Supreme Court of Florida Justice Frederick B. Karl while serving of Florida's highest court chaired the Karl Commission. The Karl Commission re-wrote the Rules Regulating the Florida Bar, the rules on which *Solomon* was based. Justice Karl's public service includes terms in the Florida House, Senate, and an unsuccessful run for governor. Former New York Court of Appeals Judge Vito J. Titone served 13 years on New York's highest court, 9 years on New York's appellate court, and 7 years on New York's trial court. He reviewed over one thousand attorney discipline cases during his judicial service. Please see their attached affidavits.

one quarter page decision that is the subject of this petition, New York's highest court granted full faith and credit to *Solomon*. *Solomon* and New York's full faith and credit to *Solomon* were intentionally unconstitutional abuses of judicial power. The question presented is *not* whether the judgments of the highest courts of Florida and New York were unconstitutional— the *Vernell* footnote admitted that these judgments were unconstitutional. This was confirmed by the unopposed expert testimony of former judges of the highest courts of Florida and New York. The question presented is this:

Will this Court grant certiorari to remedy this intentionally unconstitutional abuse of judicial power by courts in Florida, New York, and the District of Columbia, or deny certiorari and invite harsher remedies by Congress, state legislatures[4] or voter referendums to remedy this intentionally unconstitutional abuse of judicial power?

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[4] Intentional abuse of judicial power with impunity was publicly displayed by New Hampshire Chief Justice Brock's impeachment. The New Hampshire Supreme Court and Legislature reacted to the abuses with significant reforms. The bearing of the impeachment of New Hampshire's Chief Justice on this petition is discussed in the reasons for granting certiorari.

LIST OF PARTIES

The petitioner and the respondent are named in the caption. The Supreme Court of Florida, The District of Columbia Court of Appeals, and the Florida Third District Court of Appeals are directly involved in this action, although they are technically not parties to this action.

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The opinion and order of the New York Court of Appeals is reported at 739 N.E.2d 1146 (2000), and is reprinted as Appendix A at page 1a. The opinion and order of the New York Appellate Division, Second Department is reported at 702 N.Y.S.2d 562 (2 Dept., 2000), *app. denied*, and is reprinted as Appendix B at page 2a. The New York referee's report is unreported and is reprinted as Appendix C at page 6a. The opinion and order of the Supreme Court of Florida is reported at 711 So.2d 1141 (Fla.1998) and is reprinted as Appendix D at page 13a. The Florida referee's excerpted findings of fact relevant to the Florida referee's findings of guilt are unreported and is reprinted as Appendix E at page 30a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 26, 2000. Please see Appendix A at page 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const.Amend. XIV.

STATEMENT OF THE CASE

I. The *Vernell* Footnote As The Factual Background For The Question Presented.

The *Vernell* footnote is the key fact in this case. The *Vernell* footnote was argued to this Court and to the Supreme Court of Florida[5] to have admitted that *Solomon* was unconstitutional and to have repudiated *Solomon*. Both courts declined to remedy the admittedly unconstitutional and repudiated *Solomon*. Thereafter, the New York courts granted full faith and credit to *Solomon*. In the New York proceeding, former judges of the highest courts of Florida and New York gave unopposed expert testimony that it would be unconstitutional for New York to grant full faith and credit to the admittedly unconstitutional and repudiated *Solomon*. Opposing counsel in New York argued that full

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[5] The Supreme Court of Florida denied without explanation in a one sentence order the timely motion to vacate. This motion argued that the *Vernell* footnote admitted that *Solomon* was unconstitutional and repudiated *Solomon*.

faith and credit should be granted to *Solomon* because, (1) *Solomon* held that the guilt that was based on matters that were *never* charged *was* constitutional, (Opposing counsel in New York never addressed the fact that the more recent *Vernell* footnote admitted that the "prior opinions" that found guilt that was based on matters that were *never charged* were *un*constitutional and repudiated these prior opinions that fairly included *Solomon*.), and (2) the fact that this Court denied the petitions for certiorari and rehearing was further proof that the guilt that was based on matters that were *never* charged *was* constitutional.

II. The Florida Proceeding.

In the Florida proceeding, the factual findings found innocence[6] on *all* of the nearly *one thousand* charges in the Florida Bar's 55 page, 217 paragraph complaint.[7] Three of the five guilty findings were based on matters that were

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[6] For a concise analysis of how the Florida court made guilty findings that were (1) contrary to factual findings of innocence, and (2) contrary to indisputable, objective fact in the record, please see the attached affidavits of the judges of the highest courts of Florida and New York that were in evidence in the New York proceeding. For a more detailed and technical analysis, please see the pleadings filed in *Solomon v. The Florida Bar,* 119 S.Ct. 411 (1998), USSC case number 98-425.

[7] Each of the 217 paragraphs contained multiple charges. The eight count complaint consolidated a six count complaint and two one count complaints.

admittedly never charged. All five of the five guilty findings were, (1) contrary to the Florida referee's 20 page single spaced factual findings, and (2) contrary to indisputable, objective fact in the record. The Florida referee's factual findings *were consistent* with the indisputable, objective facts in the record. The only way to make sense of what the Supreme Court of Florida did in *Solomon* is to discard the assumption that the court had integrity, and assume that the court's integrity was compromised. *Solomon* specifically *affirmed the constitutionality* of the guilt that was based on matters that were *admittedly never charged. Solomon* deliberately misled the readers unfamiliar with the case — the press, the Florida legal community, and the clients in Mr. Solomon's 110 pending cases in particular — to believe that *Solomon* was finding guilt on the charges when it was finding innocence on the charges. *Solomon* did this by recounting many of the charges in *Solomon's* first six pages. This implied that the reason that the charges were being recounted was because *Solomon* was finding guilt on these charges. The one sentence[8] in *Solomon* that stated that the court found innocence on all of the charges recounted in the previous six pages, except for two, was exactly in the middle of *Solomon's* eleven pages and was understandable

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[8] This one sentence reads, ". . . Solomon be found not guilty of violating rules 4-.1. and 4-1.3 with respect to counts I, II, IV, V, and VI of case No. 86,914." Translation — innocence on *all* of the hundreds of charges in this six count complaint, except for guilt on *only one* matter that was *admittedly never charged.*

only to lawyers involved in the case. Again, guilt on the two charges were, (1) contrary to the factual findings and (2) contrary to indisputable, objective record fact.

No client had any part in the bringing of this complaint. *Solomon* specifically found an absence of selfish or dishonest motive. *All* of the clients named in the complaint who testified strongly objected to this complaint filed over their objection and supposedly in their interest. Three of the five guilty findings were based on client Elisa Fernandes' case. Elisa Fernandes was a former seminary student turned Allstate claims representative. Despite her professional involvement with the legal community, she was unable to find a lawyer to represent her until she contacted Mr. Solomon by telephone less than three hours before the four year statute of limitations was to expire. After her strong testimony for Mr. Solomon, she wrote an unsolicited letter that was admitted into evidence that called the Florida proceeding "a senseless travesty of justice . . . [and] persecution . . . for one so kind and diligent in his work".[9] Ms. Fernandes, as nearly half of the clients named in the complaint, was declared indigent by the court. Ms. Fernandes, as more than half of the clients named in the complaint, was not able to find any

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[9] The full letter is found as the last page of the appendix in USSC case number 98-425. The letter is signed by Elisa O'Hara because her surname at that time was O'Hara.

other lawyer to represent her. One client named in the complaint was *pro bono.*

III. Ruffalo.

Ruffalo[10] held that the constitution prohibited guilt that was based on matters that were *never charged.* *Ruffalo* was cited to the Supreme Court of Florida by Mr. Solomon. *Solomon* did not cite, discuss, in any way mention or allude to *Ruffalo.* 30 years after *Ruffalo, Solomon* held that the guilt that was based on matters that were *never* charged *was* constitutional. *Solomon* held,

> Solomon contends that the referee violated his due process rights by recommending that he be found guilty of *specific instances of misconduct that were not charged in the Bar's complaint. We disagree.* [emphasis supplied].

85 days after *Solomon's* rehearing was denied, the same justices admitted in the *Vernell* footnote that "prior opinions" that found guilt that was based on matters that were *never charged* were *un*constitutional. The *Vernell* footnote

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[10] *In re Ruffalo,* 390 U.S. 544 (1968).

repudiated these prior opinions that fairly included *Solomon*. The *Vernell* footnote stated,

> Vernell challenges the referee's recommendation that he be found guilty of an offense not charged in the complaint. The United States Supreme Court has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before the proceedings commence. *See In re Ruffalo*, 390 U.S. 544 (1968), *modified on other grounds*, 392 U.S. 919 (1968). The absence of fair notice as to the reach of the procedure deprives the attorney of due process. *See id.* (where attorney in disbarment proceeding had no notice that his employment of certain persons would be considered as an offense until after testimony was taken in disciplinary hearing, attorney was deprived of due process). *See also Florida Bar v. Price*, 478 So.2d 812 (Fla.1985)(rejecting "for due process reasons" referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met by a new proceeding. We

> recede from any language in prior opinions that may support a contrary result. *See e.g., Florida Bar v. Stillman,* 401 So.2d 1306 (Fla.1981).

The *Vernell* footnote was revised and then omitted from the official reporter after the *Vernell* footnote was argued to this Court and to the Supreme Court of Florida to have admitted that *Solomon* was unconstitutional and to have repudiated *Solomon.* The only example in the *Vernell* footnote of a repudiated "prior opinion" was the 17 *year* old *Stillman* and *not* the 85 *day* old *Solomon.* To cite the 17 year old *Stillman* as an example of a reputiated prior opinion rather than to cite the 85 day old *Solomon* is one of the many examples of intentional abuse of judicial power in *Solomon.* In 1998, the year in which *Solomon* and *Vernell* were decided, the 1968 *Ruffalo* was *30* years old. Mr. Solomon and Mr. Vernell both argued that *Ruffalo* held that the constitution required that guilt must be based on charges. *Solomon* and *Vernell* were pending simultaneously before the Supreme Court of Florida. The Supreme Court of Florida chose to publish *Solomon* before *Vernell,* and then repudiated *Solomon* 85 days later in *Vernell.* Another example of intentionally unconstitutional abuse of judicial power is that the timely motion to vacate *Solomon* was denied in a one sentence order with no explanation. This was an intentional abuse of judicial power because after *Vernell* was published, the timely motion to vacate *Solomon* argued that the *Vernell* footnote (1)

admitted that "prior opinions" that found guilt that was based on matters that were *never charged* were *un*constitutional, (2) repudiated these prior opinions, and (3) these repudiated prior opinions fairly included *Solomon.*

IV. The New York Proceeding.

The New York court's granting full faith and credit to *Solomon* was more blatantly an intentionally unconstitutional abuse of judicial power than *Solomon.* This is because the New York courts had the benefit of the *Vernell* footnote. The New York courts also had the benefit of the unopposed expert testimony of former judges of the highest courts of Florida and New York that the *Vernell* footnote admitted that *Solomon* was unconstitutional and repudiated *Solomon.*

New York's 22 N.Y.C.R.R.691.3(c) adopted the two tests for the unconstitutionality of foreign judgments in the A.B.A. Model Disciplinary Code. These two tests for the unconstitutionality of foreign judgments are (1) no notice and (2) infirmity of proof. Section 691.3(c) states,

> (c) This court, in default of the attorney's filing a verified statement and demand as provided for in subdivision (b) of this section, may discipline such attorney unless an examination of the entire record

> before this court, including the record of the foreign jurisdiction and such other evidence as this court in its discretion may receive, discloses (1) that the *procedure* in the foreign jurisdiction was so lacking in *notice or opportunity to be heard as to constitute a deprivation of due process;* or (2) that there was such an *infirmity of proof* establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding of the court in the foreign -- jurisdiction as to the attorney's misconduct; or (3) that the imposition of discipline by this court would be unjust. [emphasis supplied].

Former judges of the highest courts of Florida and New York gave unopposed expert testimony that the *Vernell* footnote admitted and proved that the *procedure* in Florida was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process. The *Vernell* footnote admitted and proved that the *procedure* in *Solomon* was unconstitutional because, (1) *Solomon* held that the guilt that was based on matters that were *never* charged, *was* constitutional, and (2) the *Vernell* footnote repudiated the "prior opinions" that based guilt on matters that were *never charged,* as being *un*constitutional. *Solomon* also suffered from a

total *infirmity of proof* because *Solomon* based guilt on *factual* findings of innocence. Former Supreme Court of Florida Justice Karl's affidavit concisely identified the five indisputable, objective record facts that proved that *Solomon* suffered from a total infirmity of proof in addition to suffering from an absence of constitutionally required notice. If only one of the three tests for the unconstitutionality of a foreign judgment in section 691.3(c) applied to a foreign judgment, the foreign judgment was unconstitutional and should not be granted full faith and credit. All three of the tests for unconstitutionality applied to *Solomon*. Opposing counsel in New York argued that *Solomon was* constitutional and should be granted full faith and credit because, (1) *Solomon* held that the guilt that was based on matters that were *never* charged *was* constitutional, (Again, opposing counsel in New York never addressed the fact that the more recent *Vernell* footnote admitted that the "prior opinions" that found that guilt that was based on matters that were *never charged* were *un*constitutional and repudiated these prior opinions that fairly included *Solomon*.) and (2) the fact that this Court denied the petitions for certiorari and rehearing was further proof that the guilt that was based on matters that were *never* charged *was* constitutional.[11]

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[11] The New York referee's report stated that full faith and credit should be granted to *Solomon* because the particular "items" that suffered from an absence of constitutional notice and an infirmity of proof were not "identified". This statement is wrong for two reasons, (1)

The purpose of New York's section 691 hearing is to test the constitutionality of the foreign judgment. There would be no need for a section 691 hearing if the New York law required the New York courts to rely on the statements of a foreign judgment that it was constitutional. Any foreign judgment that needs to state that it is constitutional raises the question of its constitutionality. Review of a petition for a writ of certiorari is discretionary and the fact that this Court did not grant certiorari is not a disposition by this Court on the merits.[12] The New York courts did not rely on these reasons to grant full faith and credit to *Solomon*. The reason that the highest courts of Florida and New York

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Section 691 requires that the "*procedure* . . . was so lacking in notice", and does not require that the items that suffered from a lack of notice be identified. The *Vernell* footnote admitted that the *procedure* in "prior opinions" was so lacking in notice as to constitute a deprivation of due process, and (2) Although identification of the items was not required by section 691, these items were identified in detail in the petition for a writ of certiorari previously filed in this Court. That petition and its accompanying petition for rehearing were the only two documents offered into evidence in the New York trial. The petitions were admitted into evidence without objection. Section 691 requires the New York court to perform an "examination of the entire record before this court". That examination fairly included an examination of the only two documents admitted into evidence at the trial, and admitted into evidence without objection.

[12] This Court's 1998 Statistical Sheet reflects that in 1998, the term that *Solomon* was before this Court, that this Court had 8,083 cases that requested review, and reviewed 81, and did not review 8,002. In 1998, the chances of review were one in one hundred.

intentionally unconstitutionally abused judicial power was because they knew that accountability under the law of 42 U.S.C. § 1983, was unlikely under our present system where judges judge fellow judges.

V. 42. U.S.C. Section 1983 Suits Pending In the District of Columbia And Florida.

Section 1983 was enacted in 1872 to remedy intentionally unconstitutional judgments by state judges in the South. After the Civil War, Southern judges refused to honor the former slaves new constitutional rights. *Pulliam v. Allen*, 466 U.S. 522, 540 (1984) stated,

> Congress enacted section 1983 and its predecessor, section 2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster*. . . . Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach

unconstitutional actions by all state actors, including judges.

Section 1983 was the legal remedy enacted specifically to remedy unconstitutional state judgments. *Pulliam* held that section 1983 reached the state judges responsible for unconstitutional judgments. In the *Vernell* footnote, the state judges in Florida *admitted* that the "prior opinions" — state judgments — that found that guilt that was based on matters that were *never charged* were *un*constitutional. Section 1983 actions against the state judges of Florida that were responsible for *Solomon* were filed in the District of Columbia[13] and Florida[14]. Despite the fact that the *Vernell* footnote *admitted* that such judgments were unconstitutional, these courts dismissed the section 1983 actions. No court with integrity would have dismissed the section 1983 actions against the Supreme Court of Florida when the three following facts were argued to them: (1) *Pulliam* upheld a cause of action against state judges to enjoin the prospective enforcement of unconstitutional judgments, (2) the *Vernell* footnote *admitted* that the prior opinions that found guilt that was based on matters that were *never charged* were *un*constitutional, and (3) *Solomon* explicitly held that guilt that was based on matters that were

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[13] *Solomon v. Supreme Court of Florida*, D.C. Court of Appeals Case No.: 99-CV-1257, is pending.

[14] *Solomon v. Supreme Court of Florida*, Florida Third District Court of Appeal Case No.: 3D00-3499, is pending.

admittedly *never* charged *was* constitutional. Why were the state judges in Florida not held accountable under the law of section 1983 and *Pulliam*? These judges were repeatedly not held accountable under the law because fellow judges were unwilling to hold fellow judges accountable under the law of the constitution as applied by Congress in section 1983 and as applied by this Court in *Pulliam*. It was not just one judge, or one court that has looked the other way at this intentionally unconstitutional abuse of judicial power and ignored section 1983. There have been many judges and judicial officials in Florida, New York, and the District of Columbia that have looked the other way at this intentionally unconstitutional abuse of judicial power, and that have refused to apply section 1983 to remedy the intentionally unconstitutional *Solomon*. There are two choices for this Court in our question presented. This Court can (1) grant certiorari to remedy the intentionally unconstitutional *Solomon*. Granting certiorari will place our judiciary on notice that section 1983 will be applied to the judiciary by fellow judges on this Court to remedy intentionally unconstitutional state judgments, even if fellow judges on the state's highest courts decline to do so; or (2) deny certiorari and decline to remedy this intentionally unconstitutional state judgment under section 1983. If this Court denies certiorari and declines to remedy the refusal of the judges of Florida, New York, and District of Columbia to apply section 1983 to fellow judges, then this Court will have effectively nullified the specific

Congressional intent of section 1983 to reach unconstitutional state judgments. If this Court denies certiorari, this Court effectively endorses the refusal of the judges of Florida, New York, and the District of Columbia to apply the law of section 1983 to fellow judges that are responsible for unconstitutional judgments. If this Court denies certiorari, this Court invites harsher remedies by Congress, state legislatures or voter referendums to accomplish the purpose for which section 1983 was specifically enacted. If this Court denies certiorari, it will have proven that the judges of this Court, Florida, New York and the District of Columbia were unwilling to uphold the constitution, section 1983 and *Pulliam* against fellow judges to remedy intentionally unconstitutional abuse of judicial power.

REASONS FOR GRANTING CERTIORARI

If section 1983 worked to remedy unconstitutional state judgments as Congress had intended,

(1) the Supreme Court of Florida would not have found guilt based on matters that were *never charged* knowing that 30 years earlier this Court applied the constitution in *Ruffalo* to hold exactly the opposite;

(2) the Supreme Court of Florida would not have denied the timely motion to vacate *Solomon* that argued that the *Vernell* footnote admitted

that *Solomon* was unconstitutional and repudiated *Solomon*;

(3) the New York courts would have properly applied New York's section 691.3(c) to have denied full faith and credit to the repudiated and admittedly unconstitutional foreign judgment of *Solomon*. This is especially true where former judges of the highest courts of Florida and New York gave unopposed expert testimony that the *Vernell* footnote admitted *Solomon* was unconstitutional and repudiated *Solomon;* and

(4) the courts of Florida and the District of Columbia would have applied the law in *Pulliam* to uphold the section 1983 actions against the state judges responsible for the admittedly unconstitutional *Solomon*.

Rule of law is based on the deterrent effect of punishment for failure to obey the law. Judges judging fellow judges are judging themselves. Judges judging fellow judges are not inclined to hold fellow judges accountable under the law of section 1983. The inclination of judges not to hold fellow judges accountable under the law of section 1983 is a flaw in our system. The judge who holds his fellow judge accountable under the law of section 1983 today is aware he upheld the law that may be used against him tomorrow if he strays from the law. This Court can remedy the inclination of judges not to hold fellow judges accountable under the law of section 1983 by granting certiorari. A grant of certiorari in this case will immediately and directly effect the

highest courts of New York, Florida, and the District of Columbia. If this Court grants certiorari, the courts in Florida, New York and the District of Columbia will be on notice that this Court will hold fellow judges accountable under the law of section 1983 even if fellow judges on the state's highest courts are unwilling to hold fellow judges accountable under the law of section 1983. If this Court grants certiorari, the immediate effect on the courts in Florida, New York and the District of Columbia will dramatically demonstrate to judges in the fifty states that in the rare case where state judges intentionally or unintentionally ignore the constitution, that section 1983 will be used to remedy unconstitutional judgments as Congress intended. If this Court denies certiorari in this case, it invites harsher remedies by Congress, state legislatures or voter referendums to put into practice the Congressional intent of section 1983 to remedy unconstitutional state judgments. If this Court does not grant certiorari, it will have proven that the highest courts of the U.S., Florida, New York, and the District of Columbia were unwilling to uphold the constitution, section 1983, and *Pulliam* against fellow judges responsible for intentionally unconstitutional abuse of judicial power.

Recognizing the inclination of judges not to hold fellow judges accountable under the law of section 1983, there are three rationales for presenting this petition to the Justices (judges) of this Court,

(1) the Justices of this Court hold the highest positions in our judiciary and are more concerned with the widespread (Florida, New York, District of Columbia) inclination of judges not to hold fellow judges accountable under the law of section 1983[15],

(2) the Justices of this Court prefer the existing section 1983 self policing by the courts to remedy unconstitutional judgments rather than the harsher remedies by Congress, state legislatures or voter referendums if it is proven that section 1983 often fails to remedy intentionally unconstitutional abuse of judicial power because judges are unwilling to police fellow judges, and

(3) Under the unequivocal facts of this case, if this Court denies certiorari it invites Congress, state legislatures or voter referendums to remedy an *admittedly* unconstitutional judgment that the highest courts of the U.S., Florida, New York, and the District of Columbia will have proven themselves unwilling to remedy under the law of section 1983, the law enacted by Congress to remedy unconstitutional state judgments.

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[15] *Pulliam* footnote six observed that all of the United States Courts of Appeal that faced the issue agreed that judicial immunity is not a bar to an injunctive remedy against unconstitutional judgments.

I. Impeachment of New Hampshire's Chief Justice Brock.

The inclination of judges not to judge fellow judges was dramatically displayed by the refusal of the Justices of the New Hampshire Supreme Court to hold their fellow Chief Justice and fellow Associate Justices accountable under the law for intentional abuse of judicial power. Their intentional abuse of judicial power became public *only after* the clerk could tolerate no more. The clerk gave them one week to report their abuse of judicial power and they refused. Justices of New Hampshire's highest court admitted the abuse of judicial power *only after* formal charges were filed in the legislature to impeach the Chief Justice of the New Hampshire Supreme Court.

It is true that the New Hampshire Senate refused to convict New Hampshire's Chief Justice even after he admitted to (1) perjury before the New Hampshire House Judiciary Committee, and (2) acting, albeit unsuccessfully, on *ex parte* communications to change a judge who was to decide a fellow justice's divorce case. The New Hampshire Senate voted to acquit New Hampshire Chief Justice Brock of the impeachment charges within hours of the conclusion of his lengthy trial.[16] If the New

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[16] The attached editorial in the Sunday *Manchester Union Leader* closely tracks the attached letter sent to the New Hampshire Senators by Mr. Solomon. If the Senators had fairly considered the facts in this letter, Chief Justice Brock would have been convicted.

Hampshire Senate had honestly considered what had occurred, Chief Justice Brock would have been convicted. The public's and the New Hampshire House of Representatives' disgust with this result, and perhaps even the New Hampshire Senate's remorse at their own dishonorable conduct are behind the significant judicial reforms enacted immediately by the New Hampshire Supreme Court itself and the significant judicial reforms advancing to enactment in the New Hampshire legislature. These judicial reforms are intended to remedy and prevent the abuse of judicial power exposed by Chief Justice Brock's impeachment. This abuse of judicial power resulted from the inclination of judges not to hold fellow judges accountable under the law. Chief Justice Brock and Associate Justice Thayer felt free to engage and act on *ex parte* communications because they knew that under our system of judges judging fellow judges it was unlikely they would be held accountable under the law. In full public view, they remain correct. If the New Hampshire judges had succeeded in their *ex parte* efforts to deprive Mrs. Thayer of her constitutional due process, she would have had a section 1983 action against judges responsible for an unconstitutional judgment. If this Court grants certiorari, judges will be more careful because they will have seen that although the highest courts of Florida, New York and the District of Columbia did not hold fellow judges accountable under the law of section 1983, that this Court will hold fellow judges that were responsible for

unconstitutional judgments accountable under the law of section 1983. If this Court denies certiorari, the many judges and judicial officials involved in this case can fairly conclude that judges responsible for intentional and unintentional unconstitutional judgments, are *not* likely to be held accountable under the law of section 1983 by their fellow judges by the highest courts of the U.S., Florida, New York and the District of Columbia.

II. The Constitution Applied To The Lowest Courts in *Pulliam*, And Should Apply Equally To The Highest Courts.

The inclination of judges not to hold fellow judges accountable under the law is a flaw in our system that will not go away by itself. The public's confidence in our courts as a trusted and honorable institution rather than as a tool of the elite continues to erode because of judges natural inclination *not* to hold fellow judges accountable under the law. New Hampshire's remedy to intentionally unconstitutional abuse of judicial power is to have an administrative agency review all questionable judicial behavior. A less harsh remedy would be for this Court to grant certiorari to put all judges on notice that this Court will hold fellow judges accountable under the law even if fellow judges on the highest state courts are unwilling to do so. This Court can do that by holding the elite Supreme Court of Florida and the elite New York Court of Appeals to the existing

law in *Ruffalo, Pulliam* and section 1983. *Pulliam* held a lowly county court magistrate accountable when she violated a citizen's constitutional procedural due process. The judiciary will be on notice that it is accountable under the law if this Court applies *Pulliam* to the elite Supreme Court of Florida and elite New York Court of Appeals, as it did to a lowly county court magistrate.[17] A further reason for this Court to grant this petition is because as unlikely as it may seem, even the Justices of this high Court may someday be unfairly effected by judges who intentionally act unconstitutionally because they know that they are not likely to be held accountable under the law.[18]

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[17] *Pulliam; Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); and other section 1983 cases addressed arguably honest judicial errors. If this Court grants certiorari, it must address the wrongful and intentionally unconstitutional judgments, and the refusal of numerous courts in Florida, New York, and the District of Columbia to fail to remedy an *admittedly* unconstitutional and repudiated judgment.

[18] Please see the attached Wall Street Journal page one article on the testimony of the wife of the Colorado Senate Assistant Majority Leader before the Colorado Senate. She testified against pending legislation and existing laws that her husband formerly endorsed and was instrumental in enacting. Their views changed when they, like many other Colorado citizens, were unfairly effected by the results of that legislation. Not surprisingly, the pending legislation did not pass. Likewise, legislation such as section 1983 that was enacted to restore fairness to the judiciary, that is thwarted by the judiciary that is also responsible for its enforcement, invites effective remedies by Congress, state legislatures or voter referendums.

CONCLUSION

This Court should grant certiorari to apply the constitutional principles of due process in *Ruffalo, Pulliam* and section 1983 to the elite Supreme Court of Florida and to the elite New York Court of Appeals as it did to the lowly county court magistrate in *Pulliam.*

Respectfully submitted,

DAVID SOLOMON
880 Mandalay Avenue
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APPENDIX A.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany On the twenty-sixth day Of October 2000

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding*

2-25 Mo. No. 921

In the Matter of David Lawrence Solomon, an attorney and counselor-at-law.

Grievance Committee for the Tenth Judicial District,
Respondent;
David Lawrence Solomon,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/
Stuart M. Cohen
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

___ AD2D ___

GUY JAMES MANGANO, P.J.
LAWRENCE J. BRACKEN
CORNELIUS J. O'BRIEN
SONDRA MILLER
HOWARD MILLER, JJ.

1998-04321

OPINION & ORDER

In the Matter of David Lawrence Solomon,
An attorney and counselor-at-law.

Grievance Committee for the Tenth
Judicial District, petitioner;
David Lawrence Solomon, respondent.

Motion by the petitioner pursuant to 22 NYCRR 691.3 to impose discipline on the respondent based upon disciplinary action taken against him by the Supreme Court of the State of Florida. The respondent was admitted to the practice of law in New York at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on November 15, 1989.

Grace D. Moran, Syosset, N.Y. (Nancy A. Bolger of counsel), for petitioner.

Gentile, Brotman & Benjamin, New York, N.Y. (Howard Benjamin of counsel), for respondent.

PER CURIAM. By order of the Supreme Court of the State of Florida dated February 26, 1998, the respondent was suspended from the practice of law for a period of 91 days, and upon reinstatement, was placed on probation for a period of two years.

The respondent was served with a notice pursuant to 22 NYCRR 691.3(d), informing him of his right to impose certain enumerated defenses to the imposition of discipline in the State of New York, and to request a hearing before the imposition of such discipline. In his answer, the respondent requested a hearing, raising as defenses the deprivation of due process and the infirmity of proof. By decision and order of this court, dated November 18, 1998, the petitioner's motion to impose reciprocal discipline was held in abeyance, and the matter was referred to John F. Mulholland, Esq., as Special Referee, to hear and report. A hearing was conducted on May 4, 1999, and the Special Referee concluded that the respondent failed to establish the defenses raised in his answer. Based on the evidence adduced at the hearing, we find that the Special Referee's determination was proper.

Under the circumstances of this case, the respondent is suspended from the practice of law for a period of one year, and his reinstatement in New York is conditioned upon his reinstatement in Florida.

MANGANO, P.J., BRACKEN, O'BRIEN, S. MILLER and H. MILLER, JJ., concur.

ORDERED that the petitioner's motion is granted; and it is further,

ORDERED that pursuant to 22 NYCRR 691.3, the respondent, David Lawrence Solomon, is suspended from the practice of law for a period of one year, commencing March 7, 2000, and continuing until further order of this court, with leave to apply for reinstatement no sooner than six months before the expiration of the said period of one year, upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law in the State of New York, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (*see,* 22 NYCRR 691.10), (c) that he has otherwise properly conducted himself, and (d) that he has been reinstated in the State of Florida; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until further order of this court, the respondent, David

Lawrence Solomon, shall continue to desist and refrain in the State of New York from (1) practicing law in any form, either as principal agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER:
JAMES EDWARD PELZER

James Edward Pelzer
Clerk

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT
I, JAMES EDWARD PELZER, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on FEB 7, 2000 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on FEB 7, 2000.

/s/ James Edward Pelzer

February 7, 2000

MATTER OF SOLOMON, DAVID LAWRENCE

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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In the Matter of DAVID LAWRENCE SOLOMON, an attorney and counselor-at-law,

REPORT OF
JOHN F. MULHOLLAND
SPECIAL REFEREE
98-04231

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,
Petitioner,

-against-

DAVID LAWRENCE SOLOMON

Respondent.

---------- X

TO THE JUSTICES OF THE SUPREME COURT, APPELLATE DIVISION SECOND DEPARTMENT:

This Court by order of reference, dated November 18th, 1999, directed that a hearing be conducted by the undersigned Referee to hear and report with respect to the findings of the Florida Court and the respondent's arguments on the defenses enumerated in 22NYCRR section 691.3. Petitioner appeared by Grace D. Moran, Esq. By

Nancy A. Bolger, Esq., of Counsel. The respondent appeared with Counsel, Howard Benjamin, Esq.

THE CHARGE

A motion was made by the Grievance Committee for the Tenth Judicial District, Petitioner, pursuant to 22NYCRR, section 691.3 to impose discipline on the respondent based upon the disciplinary action taken against him by the Supreme Court of the State of Florida.

By an opinion of the Supreme Court of the State of Florida, dated November 15th, 1998, the respondent was suspended from the practice of law for a period of 91 days and, upon reinstatement, will be placed on probation for a period of two years.

PROCEEDINGS

The Petitioner served the respondent, pursuant to 22NYCRR section 691.3(d), informing him of his right to raise certain enumerated defenses to the imposition of discipline in New York.

In his answer, the respondent argued that the procedures in Florida was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; that there was such infirmity of proof establishing the alleged misconduct as to give rise to the clear conviction, that this court could not consistent with its duties, ac-

cept as final the conclusion of the Florida Court and that the imposition of discipline by this Court would be unjust. In addition, the respondent exercised his right to demand a hearing pursuant to 22NYCRR section 691(c).

THE HEARING

On May 4th, 1999, the respondent appeared with his attorney, Howard Benjamin. Without objection, the respondent entered into evidence, the respondent's petition for a Writ of Certiorari and a petition for rehearing, both filed previously in the Supreme Court of the United States. (Respondent's Exhibits A&B)

The respondent called two witnesses on the hearing, the Honorable Frederick B. Karl and the Honorable Vito J. Titone.

Before the witnesses testified, petitioner's counsel made a statement on the record that she had no objection to the two witnesses testifying but that it was petitioner's position that the sanction in Florida had been litigated, and has been completed. She took no position on the issue of sanctions as that issue is in the sole discretion of the Appellate Division, Second Department and that sanctions were not an issue on this hearing. (p.6,7,&8).

Judge Frederick B. Karl testified that he was a former judge of the Florida Supreme Court. The Supreme Court being the highest Court in

the State of Florida and was comprised of seven justices.

He served on the committee of the Supreme Court to revise the laws and proceedings for disciplining attorneys and which committee wrote the procedural rules for disciplining members of the bar.

He was an expert witness on the original Solomon hearing, was present and heard the testimony of other witnesses. He, also, reviewed the order of the Florida Supreme Court, the findings of fact and law of the referee, the petition for the Writ of Certiorari and for a rehearing filed in the United States Supreme Court.

It was his opinion that the discipline was too severe, that the Supreme Court made findings of guilt and asserted punishment for matters that were not properly charged by the bar, and that there two findings of guilt not supported by the evidence. Neither, the matter not charged by the bar nor the two items not supported by the evidence, were identified.

Judge Karl was only asked the basis of his opinion that the sanctions imposed were harsh and severe.

In reply to the question, he said that it was his opinion that the evidence did not show the respondent to be incompetent or uncaring about his

clients but that the respondent did some unauthordox procedures that were unusual.

Judge Vito J. Titone testified that he was formerly a member of the judiciary of the State of New York, serving in the Supreme Court from 1969 to 976, the Appellate Division from 1976 to 1985 and the Court of Appeals from 1985 to 1998.

While in the Appellate Division, he reviewed over a thousand disciplinary proceedings. He reviewed the petition, "David Solomon against the Florida Bar", the petition of writ of certiorari and David Solomon's Notice, pursuant to section 691.3 of the rules governing attorney's conduct.

When asked his opinion as to what would have happened had Mr. Solomon's Florida proceeding been in the Appellate Division, Second Department, he stated: "I don't think it would have gotten, ever, to the Second Department. I think it would have gone to the Bar Association and they would have handled it there".

In reply to the inquiry as to the basis of this opinion, Judge Titone answered as follows

> "I am just going by what I have seen that supposedly Mr. Solomon was so horrific. First of all, I don't think he had notice. Second of all, I really don't understand how this ever got through the Florida Bar. Number one, and number tow, I don't see what

he is doing here now. I really think we would have maybe, censured him at worse. At best, he should have had a letter of admonition, but I don't think he ever had notice of what they were doing."

FINDINGS

The respondent did not establish the defenses raised in his verified answer under 22NYCRR section 691.3.

The very same arguments raised on this proceeding were raised and rejected by the Referee in the Florida disciplinary proceeding, the Supreme Court of Florida on a petition for a review of the referee's findings and a petition for rehearing of its decision; in the Supreme Court of the United States on petition for a Writ of Certiorari to the Supreme Court of Florida and on a petition for a rehearing of its decision.

Nothing has been submitted, on this proceeding, to explain why full, faith and credit should not be afforded to the decisions of the above-enumerated judicial tribunals on the very same issues.

The two witnesses produced by the respondent testified primarily as to the severity of the sanctions, an issue that was not before the undersigned.

Dated: August 26th, 1999.

Respectfully submitted,

/s/
• JOHN F. MULHOLLAND
Special Referee

APPENDIX D

Supreme Court of Florida

THE FLORIDA BAR,
Complainant,

vs.

DAVID LAWRENCE SOLOMON,
Respondent.

Nos. 86,914, 87,667, 88,762

[February 26, 1998]

PER CURIAM.

David Lawrence Solomon petitions this Court for review of the referee's findings and recommendations in these three consolidated Florida Bar disciplinary proceedings. The Florida Bar cross-petitions for review. We have jurisdiction. Art. V, § 15, Fla Const. For the reasons expressed, we approve the referee's findings and recommendations as to guilt, but modify the referee's recommendations as to discipline to include a requirement that Solomon take and pass Parts A and B of the Florida Bar Examination prior to reinstatement and exclude a requirement that Solomon obtain the assistance of co-counsel during the term of his probation.

The Bar filed three complaints against Solomon alleging various violations of rule 4-1.1

(competent representation) and rule 4-1.3 (reasonable diligence and promptness) of the Rules Regulating the Florida Bar Hillsborough County Judge Donald F. Castor was appointed referee and the cases were consolidated.

FINDINGS OF FACT

In pertinent part, the referee's findings of fact in two separate disciplinary proceedings were as follows.

Case No. 86,914

This case contains four separate counts. Count I involves Solomon's representation of Clyde and Cynthia Poole against C.F. Industries, Inc. Following a hung jury in the first trial, Solomon made numerous legal errors at the second trial that resulted in a directed verdict for the defendant. Solomon appealed the directed verdict and the Second District Court of Appeal reversed.[1]

On remand, Solomon filed a petition for certiorari claiming that he did not receive thirty days' written notice of the scheduling of the date of the third trial. Solomon failed to pay the filing fee or submit an affidavit of insolvency and the petition

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[1] In his initial brief in that case, Solomon inappropriately noted, apparently in an attempt at humor, that the appellee's attorney had the same last name as person in a cited case who was convicted of burglary and assault with intent to commit rape with a deadly weapon.

was dismissed. Prior to trial, nonbinding arbitration was ordered by the judge. The arbitrators found the defendant liable for damages, but the Pooles refused the award. In contravention of section 44 103(5), Florida Statutes (1993), Solomon filed a request with the trial judge to adopt the arbitrators' finding of liability. The request was denied, and the subsequent jury trial resulted in a verdict for the defendant.

Solomon's appeal of the verdict was initially dismissed after he failed to timely submit the initial brief. The district court's order of dismissal admonished Solomon for repeatedly ignoring the requirements of the Florida Rules of Appellate Procedure. The district court subsequently reinstated the appeal to avoid prejudice to Solomon's clients.

Solomon testified before the referee that the Poole case was his first jury trial, and that he had consulted with other attorneys and diligently researched the issues in preparation for trial. Solomon also testified that the hung jury in the first trial caused him to believe that his clients could ultimately prevail. Clyde Poole testified that he believed he was fortunate to have Solomon represent him.

Count II involves Solomon's representation of three women as personal representatives of their deceased children against the Florida Department of Transportation. A summary judgment was entered in favor of the department. Solomon

appealed and the district court affirmed the summary judgment. The Florida Bar argued before the referee that Solomon repeatedly misrepresented the facts in the record on appeal.

Count III involves Solomon's representation of an alleged stabbing victim. Solomon filed the complaint in Hillsborough County, but the trial judge transferred venue to Duval County. Solomon filed a notice of appeal of the trial court's venue order on December 1, 1991. Delays in the appeal were caused by Solomon's failure to timely remit the filing fee or an affidavit of insolvency. Moreover, in response to Solomon's irregularly captioned motions, the district court granted extensions to file the initial brief and reply brief. The reply brief was finally filed on September 8, 1992. Despite the delays, the district court "reluctantly overturned the trial court's order and remanded the matter for further proceedings on the venue question. Breen v. Huntley Jiffy Stores, 610 So. 2d 29, 30 (Fla. 2d DCA 1992). On April 17, 1993, the trial court rendered a second order transferring venue to Duval County. On July 7, 1994, Solomon appeal the second venue order. For the second time in the same case, Solomon failed to remit a filing fee or file an affidavit of insolvency. The district court warned Solomon that failure to timely remit the fee or file proof of insolvency would result in a dismissal. Solomon opted to ignore the court's warning and filed a motion for extension of time to pay the filing fee and submit his initial brief. The district court dismissed the

appeal, thus finally resolving the venue question, on August 16, 1994.

Count IV involves Solomon's appeal of an adverse ruling by the Florida Unemployment Appeals Commission. The Bar alleged that Solomon presented erroneous arguments on appeal regarding the holding of a cited case.

As to count V, Solomon filed an appeal on behalf of a plaintiff without paying the filing fee or submitting an affidavit of insolvency. Solomon's request for an extension to submit the fee or affidavit was denied and the appeal was dismissed. Upon the untimely payment of the fee, the appeal was reinstated. Solomon's subsequent motion for an extension of time to file the initial brief was denied.

As to count VI, Solomon appealed a trial court's ruling denying the subsequent administration of an estate. The district court affirmed the ruling of the trial court and remanded the matter. The trial court granted the defendant's motion to enforce the appellate mandate and denied Solomon's motion for rehearing. Solomon then appealed the trial court's order enforcing the mandate. The appellee sought sanctions against Solomon for filing a frivolous appeal, and Solomon voluntarily dismissed the appeal.

Case No. 87,667

Solomon represented the plaintiff in a personal injury action stemming from an automobile accident. In response to the defendant's discovery requests, Solomon sought a protective order to limit the disclosure of his client's medical history. The trial court admonished all counsel to refrain from disclosing without court order any information regarding the plaintiff's emotional or physical condition unrelated to the injuries sustained in the accident.

In response to the order, Solomon filed an oddly captioned petition for writ of certiorari that referred to psychotherapy received by his client for abuse as a child. Solomon failed to pay the filing fee or submit proof of insolvency with the petition. After being warned that the petition was subject to dismissal, Solomon sought an extension of time to prove his client's insolvency. In response to Solomon's request, the district court ordered him to appear and show cause why he should not be sanctioned for his repeated failure to pay filing fees or submit insolvency affidavits.[2] In response to the show cause order, Solomon filed a document resembling an affidavit that was intended to demonstrate his client's insolvency. Of this document, and Solomon's actions in general, the district court wrote, "It is apparent from

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[2] Solomon had failed on at least ten occasions in the preceding twenty-five months to file appeals with the proper fee or affidavit of insolvency. Keene v. Nudera, 661 So. 2d 40, 43 (Fla. 2d DCA 1995)

Mr. Solomon's presentation at the hearing on the order to show cause that he is not willfully disobeying our orders, but he does not understand the basic procedures for establishing indigency status in an appellate proceeding." Keene, 661 So. 2d at 43. Following the show cause hearing, the district court ordered Solomon to complete at least ten hours of continuing legal education in appellate procedure.

The district court ultimately dismissed the petition for certiorari, finding the "affidavit" of insolvency to be insufficient. Evidently, the document contained no formal oath and was not in the standard language of an affidavit. Undeterred, Solomon petitioned this Court to review the decision of the district court. This Court denied the petition and also denied Solomon's motion for reinstatement of the petition.

Judge Altendbernd of the Second District Court of Appeal testified before the referee that he was not aware of any other attorney who had repeatedly failed to remit filing fees or proof of insolvency with their appeals. Judge Altenbernd also testified that the Second District generally reinstated Solomon's appeals solely to avoid prejudice to his clients.

Case No. 88,762

Solomon represented Elisa Fernandes in a personal injury action against the owners of the property upon which Fernandes was beaten.

Solomon testified before the referee that because he only had a few hours to prepare and file the complaint prior to the running of the statute of limitations, he filed the suit in the wrong county for his own convenience. Furthermore, only one of the defendants was served. The defendant filed a motion to transfer venue and a motion for summary judgment. In response to the motions, Solomon filed a document, apparently intended as an affidavit, entitled "Notice of Filing," to which he attached a two-paragraph statement handwritten by Fernandes regarding her residence at the time of the battery. This statement was notarized and taped to a piece of paper. A cured affidavit was eventually filed. However, the judge found the affidavit insufficient and granted the summary judgment.

Solomon appealed the summary judgment. The district court framed its perception of the appeal as follows:

> We are thus confronted with the question of whether the trial court abused its discretion in refusing to rescue Fernandes from the apparent incompetence of her lawyer. We recognize the broad discretion of the trial court in matters of this kind. While we do not know the underlying reasons which compelled [Solomon] to pursue this matter in the way that

> he did, it is apparent to us that something has gone awry.

Fernandes v. Boisvert, 659 So. 2d 412, 413 (Fla. 2d DCA 1995)(footnote omitted).[3] The district court set aside the summary judgment but noted that Solomon's pleadings were in such disarray that the trial judge's grant of summary judgment was understandable. The district court also noted that Solomon's pleading marginally stated a cause of action and failed to allege special damages as required under Florida Rule of Civil Procedure 1.120(g).

Despite the courts' warning, Solomon chose not to amend the complaint to include an allegation of special damages. Solomon claimed he did not amend the complaint because he did not want to afford the defendant an opportunity to amend its affirmative defenses. However, the defendants had already so moved.

RECOMMENDATIONS REGARDING GUILT AND DISCIPLINE

The referee recommended that Solomon be found not guilty of violating rules 4-1.1 and 4-1.3 with respect to counts I, II, IV, V, and VI of case No. 86,914. However, the referee recommended that Solomon be found guilty of violating rules 4-

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[3] The district court stated, "We know of no CLE program which would address the errors of the fundamentals of pleading and procedure that appear here." Fernandes, 659 So. 2d at 413 n.5.

1.1 and 4-1.3 with regard to count III. In addition, the referee recommended that Solomon be found guilty of violating rule 4-1.1 with respect to case No. 87,667 and case No. 88,762. The referee then recommended that Solomon be suspended for ninety-one days and thereafter until reinstated and that he be ordered to pay the costs incurred by the Bar. The referee also recommended that upon Solomon's reinstatement, Solomon be placed on probation for two years subject to certain terms and conditions. In making his recommendation, the referee considered the following factors in aggravation: multiple offenses; pattern of misconduct, and refusal to acknowledge wrongful nature of conduct. We note that the referee found an absence of dishonest or selfish motive in mitigation. The referee also considered that Solomon was admitted to the Bar in 1983 and had received a private reprimand in 1990.

ANALYSIS AS TO GUILT

Solomon raises a total of eight issues. After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.[4] In the first of the issues we do ad-

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[4] The first three issues concern case No. 88,762. First, Solomon argues that his complaint sufficiently alleged special damages and that he should not be disciplined for failing to amend it per the recommendation of the district court. Second, Solomon argues that the fact that he prevailed on appeal precludes a finding of incompetence. Third, Solomon asserts that the referee's finding that filing a complaint in the improper venue can result in a dismissal with prejudice is erroneous. Fourth, as to case No. 87,667,

dress, Solomon contends that the referee violated his due process rights by recommending that he be found guilty of specific instances of misconduct that were not charged in the Bar's complaint. We disagree. This Court has repeatedly recognized that the referee's report may include evidence of unethical conduct "not squarely within the scope of the Bar's accusations" when "it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." Florida Bar v. Stillman, 401 So. 2d 1306, 1307 (Fla. 1981), Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997)(referee's recommendation as to guilt is valid despite Bar complaint not specifically charging respondent with underlying instances of misconduct). The referee's report issued in this case references conduct that was clearly within the scope of the Bar's accusations. We find that Solomon was properly and adequately notified of the nature and extent of the charges against him.

Solomon next argues that the findings and conclusions of the referee in cases 87,667 and 88,762 are not supported by competent and substantial evidence. As to case No. 87,667, Solomon contends that the referee's findings and conclusions cannot stand because they are based on evidence stricken from the record. The Bar agrees

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Solomon argues that captioning a motion with the title to a statute does not evidence incompetence. Fifth, as to case No. 86,914, Solomon asserts that filing an interlocutory appeal does not delay litigation.

that the referee struck all evidence relating to the sexual assault and child abuse references in the titles of Solomon's motions. However, the Bar argues that, despite the stricken testimony, the record clearly establishes that Solomon acted incompetently in this case.

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. Florida Bar v. Bustamante, 662 So. 2d 687 (Fla. 1995). The record reveals that Solomon's repeated failure to remit filing fees or submit proof of insolvency with his appeals frustrated the Second District Court of Appeal to the extent that Solomon was summoned to show cause and sanctioned for his incompetence. Solomon's attempt to prove his client's indigency was unconventional and ultimately failed. The interests of his client were clearly harmed by his incompetence. We conclude that the record contains competent and substantial evidence supporting the referee's recommendation that Solomon be found guilty of violating rule 4-1.1 in case No. 87,667.

At to case No. 88,762, Solomon likewise asserts that the findings and conclusions of the referee are based on inadmissible evidence. Specifically, Solomon claims that the referee struck all evidence regarding his opposition to the sum-

mary judgment motion, and without this evidence, the conclusions of the referee cannot stand. Our review of the record reveals that the referee sustained objections to the relevancy of certain testimony regarding Solomon's handling of the summary judgment appeal. However, the record clearly reveals that the referee admitted other substantial and competent evidence regarding Solomon's representation in the appeal. We conclude that the record supports the referee's recommendation of guilt in case No. 88,762.

In its cross-petition for review, the Bar claims that the referee's findings of fact as to counts I, II, IV, V, and VI of case No. 86,914 demonstrate that Solomon violated rules 4-1.1 and 4-1.3. The Bar also claims Solomon violated rule 4-1.3 in case No. 87,667. Finally, the Bar argues that the referee erroneously required that actual harm or prejudice to Solomon's clients be shown as an element of incompetence or lack of diligence. We agree with the Bar that actual harm or prejudice is not an element of incompetence or lack of diligence under the Rules Regulating the Florida Bar. See Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993). Regardless, after reviewing the record, we conclude that the referee's findings are supported by competent, substantial evidence.

ANALYSIS AS TO DISCIPLINE

While a referee's recommendation for discipline is persuasive, this Court has the ultimate responsibility to determine the appropriate sanc-

tion. Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). A bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994).

As discussed in detail in this opinion, this case involves the persistent failure of Solomon to competently represent his clients and comply with basic rules of civil and appellate practice and procedure. The nature of Solomon's conduct is inexplicable. His incompetence and lack of diligence have affected many of his clients, some of whom were clearly harmed as a result of his actions. Moreover, Solomon's incompetence has been demonstrated in pre-trial, trial, and appellate proceedings. Based on his findings and conclusions and the aggravating and mitigating factors, the referee found a ninety-one day suspension and two year probation following reinstatement to the practice of law to be the appropriate discipline. We find that the circumstances clearly justify the approval of the suspension and probation recommended by the referee. However, we decline to adopt the referee's recommendation that Solomon obtain co-counsel in all pending and future litigation matters during the term of probation. We do find there must be appropriate supervision during Solomon's probationary period and that Solomon must take and pass parts A and B of the Florida Bar Examination as a condition of reinstatement.

Accordingly, David Lawrence Solomon is hereby suspended for ninety-one days. The suspension will be effective thirty days from the filing of this opinion so that Solomon can close out his practice and protect the interests of existing clients. If Solomon notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Solomon shall accept no new business from the date this opinion is filed until the suspension is completed. Solomon shall take and pass Parts A and B of the Florida Bar Examination prior to filing a petition for reinstatement to the practice of law in this state.

Upon reinstatement, Solomon will be placed on probation for a period of two years. During the term of the probation, Solomon shall forward quarterly reports to The Florida Bar listing all clients and the nature and status of the matter. In addition, within ten days after reinstatement, Solomon shall contact the Law Office Management and Advisory Service (LOMAS) and undergo an office procedures and record-keeping analysis. Solomon shall cooperate with LOMAS in the conduct of the analysis and shall fully comply with and implement, at his sole cost and expense, all recommendations made by LOMAS. The LOMAS analysis shall consist of, at a minimum, an initial review within thirty days of the date of reinstatement and a final review six months prior to termination of the discipline ordered herein, con-

firming compliance with and implementation of the recommendations of LOMAS. LOMAS may require such additional interviews or reviews as it may, in its sole discretion, deem necessary or advisable. Solomon shall pay all fees and expenses of LOMAS incurred or required in connection with the conduct of its analysis LOMAS shall provide the Lawyer Regulation Department of The Florida Bar with status reports as to the ordered analysis. We also enter judgment against Solomon in favor of The Florida Bar for costs in the amount of $11,600.23, for which sum let execution issue.

It is so ordered.

OVERTON, SHAW, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.

KOGAN, C.J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.

THE FILING OF A MOTION FOR REHEARING SHALL NOT LATER THE EFFECTIVE DATE OF THIS SUSPENSION.

KOGAN, C.J., concurring in part and dissenting in part.

I concur as to the findings of the Court that the respondent is guilty of violating the rules governing professional conduct and agree with the court's imposition of a ninety-one day suspension, as well as a two-year probation upon rein-

statement. However, I cannot see where a retaking of the Bar examination by the respondent will in any way determine under the facts of these cases his competency to practice law. I feel that, based upon all of these cases, we should require the respondent to submit to a mental competency examination by a licensed professional in order to assist him in attaining the level of competency necessary for him to meet his responsibilities as a lawyer.

ANSTEAD, J., concurs.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John A. Boggs, Staff Counsel, Tallahassee, Florida; and Joseph A. Corsmeier, Assistant Staff Counsel, Tampa, Florida,

for Complainant

Donald A. Smith, Jr. of Smith & Tozian, Tampa, Florida; and Richard Greenberg, Tallahassee, Florida; and David L. Solomon, Clearwater, Florida,

for Respondent

COPY
Clerk
Supreme Court of Florida

By /s/_____
Deputy Clerk

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	Case No. 86,914 TFB No. 94-11,299 (6E)
Complainant,	TFB No. 95-10,269 (6E)
v.	TFB No. 95-10,617 (6E) TFB No. 95-10,618 (6E)
DAVID LAWRENCE SOLOMON,	TFB No. 95-10,619 (6E) TFB No. 95-10,621 (6E) Case No. 87,667
Respondent.	TFB No. 95-11,780 (6E) Case No. 88,762 TFB No. 96-10,630 (6E)

_____/

January 6, 1997
Tampa,
Florida

REPORT OF REFEREE

APPEARANCES:

For the Complainant:	Joseph A. Corsmeier, Esquire Tampa Airport Marriott Hotel Suite # C-49 Tampa, Florida 33607
For the Respondent:	Donald A. Smith, Jr., Esquire 109 North Brush Street Suite #150 Tampa, Florida 33602

Richard A. Greenberg, Esquire
300 West Park Avenue
Tallahassee, Florida 32399

* * * * *

Count III
TFB No. 95-10, 617 (6E)
Complaint of The Florida Bar - Breen v. Huntley-Jiffy Stores

Respondent pursued two separate appeals before the Second DCA in the trial courts order transferring venue from Hillsborough County to Duval County. The incident giving rise to the lawsuit occurred in Duval County on March 21, 1987, when the plaintiff was stabbed at or near a phone booth. The initial notice of appeal of the trial court's order transferring venue to Duval County was filed on December 2, 1991.

* * * * *

Inasmuch as the Second DCA saw fit to grant Respondent's numerous motions for additional to prosecute the first notice of appeal, and ultimately adopted Respondent's position by overturning the initial ruling of the trial court, there does not appear to be sufficient evidence of incompetence or lack of diligence by Respondent with respect to the first notice of appeal.

The remaining issue is to the manner in which Respondent dealt with the filing of the second notice of appeal. It appears clear that following the trial court's second order transferring venue to Duval County on April 7, 1993, and inasmuch as

the incident giving rise to the lawsuit occurred on March 21, 1987, the interest of the client would be best served by adopting one of two possible courses of action. One, undertaking to conclude the case in Duval County on a timely basis, or two, if in good faith Respondent believed that a second appeal was in the best interest of his client, not only to file the second notice of appeal on a timely basis but to vigorously pursue it.

Respondent chose however, to file the second notice of appeal, thus delaying the timely completion of litigation in Duval County and then by failing to timely file the second notice of appeal brief or notice of appeal, suffered the dismissal of the second appeal on August 16, 1994.

For these reasons, the referee finds that the interest of Respondent's client was clearly damaged by the protracted litigation and constitutes sufficient grounds for finding that Respondent has violated Rule 4-1-1, competency and Rule 4-1-3, diligence.

* * * * *

Supreme Court Case No. 87. 667
TFB NO. 95-11. 780 (6E)
Keene v. Nudera

In 1993, Respondent filed a personal injury action on behalf of Marjorie Keene arising out of an auto accident on July 10, 1989. In response to defendant's efforts to obtain the medical history of Ms. Keene, Respondent filed a motion for protective

order essentially seeking to limit the disclosure of prior medical care unrelated to the injuries sustained in the accident.

The order of the trial court entered by Judge Ward on July 19, 1994, attempted to properly balance the interests of both parties while requiring the plaintiff to respond to the request for production, including in paragraph 4 the following language, "This Court admonishes all counsel to safeguard and not divulge or disclose without court order information pertaining to plaintiff relating to any emotion or mental condition and/or physical condition not related to the accident in question."

On November 21, 1994, Judge Ward entered an order compelling Respondent to provide answers or better answers to interrogatories and to produce documents earlier requested by the defendant in an effort to avoid the possible consequences of producing certain medical records which it produced.

Objecting to that limited disclosure pursuant to Judge Ward's order of July 1994, Respondent filed a petition for certiorari to the Second DCA on December 21, 1994, with the following caption: "Petition For Writ of Certiorari and Request to Review the 11/21/94 Order of Hillsborough County Circuit Judge Compelling Production of Psychotherapist Records Detailing Abuse As a Child, the Present Claim for Low Back and Related Injuries."

On December 21, 1994, as order of the Second DCA noted that Respondent's petition for certiorari had been filed without paying the $250.00 filing fee or tendering an affidavit of insolvency on a timely basis and advised Respondent the case would be dismissed if neither were received within twenty (20) days of the order.

When Respondent sought further extension of time allowed under the order of December 21, 1994, an order to show cause was filed requiring Respondent to appear before the Court on January 31, 1995, to show cause why sanctions should not be imposed for repeatedly filing appeals without paying the filing fees or insolvency affidavits.

On January 25, 1995, Respondent filed an affidavit by Marjorie Keene in support of her motion for insolvency. In a written opinion entered on May 19, 1995, the Second DCA dismissed the petition for certiorari finding that the affidavit of Marjorie Keene was insufficient inasmuch as it contained no formal oath nor did it employ the standard language of an affidavit. Rehearing was denied on June 12, 1995.

Significantly, Respondent's motion for rehearing of the opinion filed on May 19, 1995 was captioned as follows: "Appellant's Motion for Rehearing Their Opinion Filed 5/19/95, Grounds For Such Rehearing Being Florida Statute 90.5035, Sexual Assault, Counselor/Victim Privilege, FRAP

9.100(B) Original Proceedings, Subsection B, Addressing Filing Fees."

On August 25, 1995, Respondent filed a further appeal from the Florida Supreme Court which declined to accept jurisdiction and dismissed the appeal on November 9, 1995. On February 2, 1996, the Florida Supreme Court denied Respondent's motion for reinstatement of the appeal.

Respondent properly attempted to restrict the disclosure of possible irrelevant medical information when he filed the motion for protective order. Judge Ward recognized the importance of such an effort and fashioned an order entered on July 19, 1994, clearly limiting the disclosure of such information by counsel.

Inasmuch as Respondent had taken such pains to restrict disclosure of child abuse at the trial level, what is clearly inexplicable is the explicit language used by Respondent in filing the petition for certiorari on November 21, 1994, and unnecessarily drawing attention to the child abuse history by including a reference to child abuse in the caption of the petition.

Moreover, in Respondent's subsequent motion for rehearing of an opinion filed 5/19/95, rehearing of the opinion filed 5/19/95, once again Respondent unnecessarily used explicit language in the caption referring to the sexual assault counselor/victim privilege. It is clear that such practice by Respondent was prejudicial to the interest

of his client Marjorie Keene and falls substantially short of the minimum standards for representation of a client and that it violates The Florida Bar's rule on competence, 4-1.1.

Supreme Court Case No. 88,762
TFB No. 96-10,630 (6E)
Elisa Fernandes v. Donna Boisvert

Respondent represented Elisa Fernandes in a personal injury action he filed on her behalf. The facts of the personal injury action arose out of an incident occurring January 25, 1989 in Pinellas County wherein Respondent's client was allegedly brutally beaten by her former boyfriend on the property allegedly owned by several defendants in the lawsuit who not only allegedly know of the former boyfriend's state of mind and propensity for violence but also observed the beating during a thirty (30) minute time frame and allegedly failed to take any action to stop the beating or to contact the proper authorities by dialing 911.

For these reasons, the property owners were charged with negligence and alleged to be responsible for medical bills at Tampa General and permanent injuries. The allegation of incompetence and lack of diligence essentially rise out of three categories: one, filing the suite in Hillsborough County; two, Mr. Solomon's actions in dealing with the defendant's Motion for Summary Judgment; and, three, his failure to amend the initial complaint to allege more specific special damages.

With respect to the venue issue, Respondent testified that he took the case when no other attorney would do so. He only had a few hours to prepare and file the complaint on the last day prior to the running out of the statute of limitations and of necessity spent most of the time checking the property title records to make sure he was including in the lawsuit all the necessary property owners.

Respondent testified that he intentionally filed the suit in Hillsborough County for his own convenience even though he was aware that Pinellas County was the proper venue. Apparently he was unaware of the possibility that if the suit were dismissed for improper venue the case might well be subject to dismissal with prejudice. Accordingly, the referee finds that the intentional filing of the lawsuit on the last day in a clearly inappropriate venue substantially jeopardized the interests of the client, notwithstanding the fact that opposing counsel agreed later to a transfer of the case to Pinellas County. Such practice by Mr. Solomon is sufficient to constitute a lack of competence as required under Rule 4-1.1.

With respect to Mr. Solomon's handling of the defendant's Motion for Summary Judgment, based upon the Court's taking judicial notice of the court file, the sequence of defendant's pleadings reflect that on or about March 3, 1993, one of the defendants, Donna Boisvert, now known as Donna Leven, who apparently was the only party served, made an appearance, and filed an answer

denying the claim and asserting four (4) affirmative defenses and also filed a motion to transfer for improper venue.

On April 23, 1993, the same defendant filed a Motion to Dismiss for failure to state a cause of action and scheduled a hearing on the Motion to Dismiss for June 2, 1993. On April 30, 1993, the defendant, Donna Boisvert, now known as Donna Leven, served a Motion for Summary Judgment with an attached affidavit, in proper form executed by Ms. Boisvert, asserting she had no knowledge of Todd Leven's emotional condition and was not aware of the incident until after it occurred.

The hearing on the defendant's Motion for Summary Judgment was scheduled for June 2, 1993 and notice of the hearing on the Motion for Summary Judgment was served upon plaintiff's counsel on April 30, 1993. In response to the Motion for Summary Judgment, Respondent, on May 28, 1993, filed an ambiguous writing entitled "Notice of Filing" to which he attached, one, an affidavit of a so called security consultant relating to the duty and care of a landowner and, two, a two-paragraph statement handwritten by Elisa Fernandes which was attached to a piece of paper and related solely to Fernandes' residence on the date of the incident. It bore the seal and signature of the notary but clearly did not meet the standards required for an affidavit.

In his testimony before the referee on December 4, 1996, on page 163, Mr. Solomon explained the reason that the initial two-paragraph writing bearing Elisa Fernandes' signature, served on May 28, 1996, dealt with Ms. Fernandes' residency. Mr. Solomon explained that he had spoken to the attorney for the defendant, Ms. Welsh on the phone on or about April 13, 1993, who informed him that the only issue she was intending to deal with at a future summary judgment hearing was that of Ms. Fernandes' residency and for that reason Mr. Solomon chose to limit Ms. Fernandes' two-paragraph writing to the residency issue.

Since he filed Ms. Fernandes' two-paragraph writing as to residence, which was dated April 17, 1996, only four (4) days after Mr. Solomon's conversation with Attorney Welsh on April 13, 1996, it would appear that Mr. Solomon had a reasonably quick method of making contact with Ms. Fernandes. It becomes of substantial importance when one notes that the defendant's actual Motion for Summary Judgment was served upon Mr. Solomon on April 30, 1993, and asserted four (4) separate bases for the Court awarding summary judgment rather than just the residency issue.

Consequently, it would appear that Mr. Solomon had nearly a full month, from about May 1, 1993 through May 30, 1993, to make further contact with Ms. Fernandes and discuss the proper manner of dealing with the defendant's more extensive Motion for Summary and to prepare a legally

proper affidavit with a timely submission to defendant's counsel prior to the summary judgment hearing presumably held on June 2, 1993.

According to Mr. Solomon's testimony, he was indeed frantically attempting to reach Ms. Fernandes during the month of May without success in order to prepare a cured four (4) paragraph affidavit for her signature. She finally called him on June 1, 1993 and she physically appeared at the summary judgment hearing on June 2, 1993. At that time, Mr. Solomon testified that he asked for a continuance of the summary judgment hearing for the purpose of filing a cured affidavit. The record is unclear as to whether the defendant's attorney, Ms. Welsh, objected at that time or not or whether Judge Bonanno ruled on such a request.

In any event, a cured and properly filed affidavit executed by Ms. Fernandes was apparently filed on that date, June 2, 1993, which Judge Bonanno found to be either untimely filed or legally insufficient to raise a material issue of fact. Subsequently, the Second DCA set aside the summary judgment in favor of plaintiff through the substantial efforts of Mr. Solomon. The fact that the committed error in entering the summary judgment is not dispositive however, on the issue of whether Mr. Solomon was in violation of the Bar standards for competency. In its opinion, the DCA noted that the plaintiff's pleadings were in disarray and clearly contributed to the confusion surrounding the entry of the summary judgment at the outset. The fact that the Appellate Court

was willing to pluck the plaintiff's chestnuts out of the fire, so to speak, does not signify that Mr. Solomon had acted competently during the summary judgment proceedings.

Given the totality of the circumstances, the referee finds that Mr. Solomon's actions contributed substantially to the delay and consequent harm in timely litigating his client's case and finds that such action fails to meet the standards for competency under Rule 4-1.1.

Finally, it is urged that the failure of Mr. Solomon to amend the complaint to properly allege special damages placed Ms. Fernandes in jeopardy at the time of trial. Whereas substantial discovery may have been completed and defendant's counsel may not have raised the issue as to the sufficiency of the claim to date, this does not indicate that defendant's counsel would acquiesce to a verdict form as to special damages at the time of trial.

Mr. Solomon stated his rationale for not moving to amend the initial complaint was based upon his strategy in avoiding an opportunity for the defendant to amend its affirmative defenses. A review of the court file however reflects that the defendant has already moved to amend its affirmative defenses and a hearing on such motion is pending.

In view of the specific footnote one, added to the Second DCA's opinion authored by Judge Patter-

son, clearly suggesting the need for an amended complaint containing an allegation of special damages, the failure to seek an amendment to the initial complaint so as to add special damages reflects a lack of requisite skill required under Rule 4-1.1 dealing with legal competency.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: As to each count of the complaints, I make the following recommendations as to guilt or innocence:

Supreme Court Case No. 86,914

COUNT I
TFB No. 94-11,299 (6E)
(Complaint of John N. Jenkins Poole v. C.F. Industries)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT II
TFB No. 95-10,269 (6E)
Complaint of The Florida Bar - Polk v. Plaintiffs
and
State of Florida Department of Transportation

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT III
TFB No. 95-10,617 (6E)
Complaint of The Florida Bar - Breen v. Huntley-Jiffy Stores

I recommend that Respondent be found guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT IV
TFB No. 95-10,618 (6E)
(Complaint of The Florida Bar - Keene v. Burdines)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT V
TFB NO. 95-10,619 (6E)
Complaint of The Florida Bar - Hurst v. Yamaha)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT VI
TFB NO. 95-10,621 (6E)
Complaint of The Florida Bar - Finley v. Villanti

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

Supreme Court Case No. 87,667
TFB NO. 95-11,780 (6E)
Keene v. Nudera

I recommend that Respondent be found guilty of violating Rule 4-1.1 (competence) and not guilty of violating Rule 4-1.3 (diligence).

Supreme Court Case No. 88,762
TFB NO. 96-10,630 (6E)
Elisa Fernandes v. Donna Boisvert

I recommend that Respondent be found guilty of violating Rule 4-1.1 (competence).

* * * * *

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of
DAVID LAWRENCE SOLOMON,
an attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT,
Petitioner,

-against-

DAVID LAWRENCE SOLOMON,

Respondent.

AFFIRMATION OF HON. FREDERICK B. KARL

Frederick B. Karl, being first duly sworn, deposes and states as follows: I am a resident of Tampa, Hillsborough County, Florida. I am a member of the Florida Bar, and have been such for more than 50 years. I am a former Justice of Florida's highest court, the Supreme Court of Florida. While serving on that court, I chaired the committee which re-wrote the rules which govern the conduct of Florida attorneys. I am well acquainted with David Solomon and his matter

pending before the Florida Bar. I was asked to testify and did testify in a New York proceeding concerning the possibility of action being taken against him in New York as a result of his Florida experience. This affidavit is to clarify the basis for my testimony that the § 691 defenses of no notice or infirmity of proof apply to all five of the Supreme Court of Florida's findings of guilt against Mr. Solomon.

I have been informed that the Petition for a Writ of Certiorari and Petition for Rehearing, which were filed in the Supreme Court of the United States, had been admitted into evidence in New York without objection in the hearing on May 4, 1999. 1 was familiar with the contents of the Petition for a Writ of Certiorari and Petition for Rehearing at die time that I testified in New York and felt that the assertions therein were true. It is my understanding that § 691 governs reciprocal discipline in this jurisdiction and provides the defenses of NO NOTICE and INFIRMITY OF PROOF to the Supreme Court of Florida's decision in Solomon's case. My testimony as to those defenses was and is consistent with the factual statements in the two documents filed before the Supreme Court of the United States, which I testified I had reviewed.

I have reviewed the written decision of the Supreme Court of Florida in Mr. Solomon's case as well as the 217 paragraphs which were charged in writing by the Florida Bar against Mr. Solomon and which were the basis of that published decision of the Supreme Court of Florida.

The Supreme Court of Florida made five findings of guilt against Mr. Solomon, and it is my opinion that the § 691 defenses apply to each of the five findings.

With respect to the issue of notice, I have reviewed the Supreme Court of the United States case of In re Ruffalo, 390 U.S. 544 (1968) which holds that the 14th Amendment of the United States Constitution requires procedural due process and that "The charge must be known before the proceedings commence". The Supreme Court of Florida in its opinion recited that the findings of guilt are based on "specific instances of misconduct that were not charged in the Bar's complaint". (emphasis added). It is my opinion that the order of the court was not consistent with the Supreme Court of the United States' opinion In re Ruffalo. In that opinion the Supreme Court of the United States held that attorney discipline proceedings are "adversary proceedings of a quasi-criminal nature" in which "[t]he charge must be known before the proceedings commence," 390 U.S. at 551, concluding that the "absence of fair notice as to ... the precise nature of the charges deprived petitioner of procedural due process." 390 U.S, at 552.

The Supreme Court of Florida did not cite Ruffalo in its opinion affirming the discipline imposed on Mr. Solomon, instead relying on its own decisions in Florida Bar v. Stillman, 401 So.2d 1307 (Fla. 1981) and Florida Bar v. Nowacki, 697 So.2d 868 (Fla. 1997), which had affirmed discipline on charges not specifically alleged in the Bar

complaint. However, less than three months after denying Mr. Solomon's petition for rehearing, the Supreme Court of Florida cited Ruffalo in a different proceeding, Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998), in which it wrote:

> Vernell challenges the referee's recommendation that he be found guilty of an offense not charged in the complaint. The Supreme Court of the United States has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before proceedings commence. See In re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968), modified on other grounds, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed.2d 1380 (1968). The absence of fair notice as to the reach of the procedure deprives the attorney of due process. See id. (where attorney in disbarment proceeding had no notice that his employment of certain persons would be considered an offense until after testimony was taken in disciplinary hearing, attorney was deprived of due process). See also Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) (rejecting 'for due process reasons' referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding. We recede from any language in prior opinions that may support a contrary result. See e.g.,

Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Where even the court which originally disciplined Mr. Solomon has repudiated the precedents under which it disciplined him for charges not alleged in the original complaint, there can be no reason for New York to discipline him on the same improper grounds.

The three findings of guilt that the Supreme Court of Florida made without Mr. Solomon being charged therefor are that:

(a) The "DELAY" which was necessary to successfully exercise a client's right to appeal the erroneous final dismissal of the client's case is attorney misconduct;

(b) A venue challenge which resulted in a transfer may have resulted in a dismissal rather than a transfer; and

(c) An appeal of a non-final order which lasted only 39 days was a "DELAY" which was "protracted litigation."

It is further my opinion that the §691 defense of Infirmity of Proof applies to all five of the findings of guilt against Mr. Solomon, because in each case they are contrary to the indisputable, objective facts in evidence, because:

(a) The finding that the "DELAY" caused by Mr. Solomon's exercise of his client's right to appeal the erroneous final dismissal of her case suffers from an infirmity of proof because the indisputable, objective fact in evidence is that the appeal was successful, the client had a right to have the case appealed and the time limits provided by the rules for an appeal of this type were adhered to. Any delay caused by the required passage of time in the appellate process is not attorney misconduct.

(b) The finding that a venue challenge which resulted in a transfer may have resulted in a dismissal rather than a transfer also suffers from an infirmity of proof because it is contrary to the indisputable, objective fact in evidence that this case was transferred and not dismissed, and that all venue challenges in Florida have resulted in a transfer and have never resulted in a dismissal.

(c) The finding that an appeal of a non-final order which lasted only 39 days was a "DELAY" which was "protracted litigation", is contrary to the indisputable, objective fact in evidence that Rule 9.130(f) which governs review of non-final orders provides that the "lower tribunal may proceed with

all matters" during any review of a non-final order. Therefore, this finding also suffers from an infirmity of proof.

(d) The finding that Mr. Solomon did not include the words "medical care" in his client's lawsuit is based on infirmity of proof because it is contrary to the indisputable, objective fact in evidence that Mr. Solomon DID include the words "medical care" in paragraph 8 of his client's lawsuit;

(e) The finding that the Supreme Court of Florida did not waive their own $250 filing fee for Mr. Solomon's pro bono indigent client because the client's indigency affidavit "ultimately failed" is a finding which suffers from infirmity of proof because it is contrary to the indisputable, objective fact in evidence that the Supreme Court of Florida DID waive their own $250 filing fee to review Mr. Solomon's pro bono indigent client's case.

Based on the foregoing, it is my opinion, and I am prepared to testify that the imposition of any reciprocal discipline is unjust because the Supreme Court of Florida acted in violation of the case of In re Ruffalo and did not require notice to Mr. Solomon in three of the five findings of guilt. Moreover, all five of the findings of guilt by the

Supreme Court of Florida suffer from an infirmity of proof as explained above.

/s/_____
Frederick B. Karl

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

The foregoing instrument was sworn to before me this 11th day of October, 1999, Frederick B. Karl, who is personally known to me. ~~or who has produced _____ as identification~~.

/s/_____
NOTARY PUBLIC
Name: Marga Jones
Serial #:_____
My Commission Expires:

Marga Jones
My Commission #CC595014 Expires
December 26, 2000
Bonded Thru Troy Fain Insurance, Inc.

APPENDIX G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of
DAVID LAWRENCE SOLOMON,
an attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT,
Petitioner,

-against-

DAVID LAWRENCE SOLOMON,

Respondent.

AFFIRMATION OF HON. VITO J. TITONE

VITO J. TITONE, an attorney duly admitted to practice in the State of New York, affirms the following under penalty of perjury:

1. I am Of Counsel to the firm of Mintz & Gold LLP, and a former member of the judiciary of the State of New York. I submit this Affirmation in support of respondent David Lawrence Solomon's Motion to Disaffirm, setting forth the basis for my conclusion that Mr. Solomon was not properly no-

tified of the charges upon which the State of Florida based its discipline. I have personal knowledge of all facts set forth herein.

2. I served as an Associate Judge of the New York Court of Appeals from 1985 until September 1, 1998, as a judge of the Supreme Court, Appellate Division from 1976 to 1985; and as a Justice of the Supreme Court from 1969 until 1976. While in the Appellate Division, I reviewed over a thousand disciplinary proceedings. I have reviewed the proceedings below, including the complaint filed against Mr. Solomon in Florida, the written decision of the Supreme Court of Florida, Mr. Solomon's Petition for Writ of Certiorari to the United States Supreme Court, and Mr. Solomon's Notice pursuant to § 691.3 of the rules governing attorneys' conduct in the State of New York. This document provides the basis for my testimony.

3. I testified at a hearing conducted by Special Referee John F. Mulholland on May 4, 1999, by order of reference issued by this Court on November 18, 1998. My testimony at this hearing included my conclusion that Mr. Solomon was never properly notified of the charges upon which the State of Florida based its discipline. I submit this Affirmation to elaborate on, and state the basis for, this conclusion.

4. The Florida Supreme Court rejected Mr. Solomon's claim that the court-appointed referee "violated his due process rights by recommending

that he be found guilty of specific instances of misconduct that were not charged in the Bar's complaint." The Florida Bar had filed a 217-paragraph complaint against Mr. Solomon – surely, more than ample space in which to allege any misconduct it believed Mr. Solomon had committed – yet three of the five findings of guilt which formed the basis for Florida's discipline were based on instances never alleged in the Complaint. The three findings of guilt based on "specific instances of misconduct that were not charged in the Bar's complaint" were:

- The "delay" which was necessary to successfully exercise a client's right to appeal the erroneous final dismissal of the client's case;

- A venue challenge which resulted in a transfer may have resulted in a dismissal rather than a transfer; and

- An appeal of a non-final order, which lasted only 39 days and was a "delay" which "protracted litigation."

None of these charges were specifically alleged in the 217-paragraph complaint against Mr. Solomon.

In In re Ruffalo, 390 U.S. 544 (1968), the United States Supreme Court held that attorney discipline proceedings are "adversary proceedings of a quasi-criminal nature" in which "[t]he charge

must be known before the proceedings commence," 390 U.S. at 551, concluding that the "absence of fair notice as to . . . the precise nature of the charges deprived petitioner of procedural due process." 30 U.S. at 552.

6. The Florida Supreme Court did not cite Ruffalo in its opinion affirming the discipline imposed on Mr. Solomon, instead relying on its own decisions in Florida Bar v. Stillman, 401 So.2d 1306 (Fla 1981) and Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997), which had affirmed discipline on charges not specifically alleged in the Bar complaint. However, less than three months after denying Mr. Solomon's petition for rehearing, the Florida Supreme Court cited Ruffalo in a different proceeding, Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998), in which it wrote:

> Vernell challenges the referee's recommendation that he be found guilty of an offense not charged in the complaint. The United States Supreme Court has held that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before proceedings commence. See In re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968), modified on other grounds, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed.2d 1380 (1968). The absence of fair notice as to the reach of the procedure deprives the attorney of due process. See Id. (where attorney in disbarment proceeding had no notice that he em-

ployment of certain persons would be considered an offense until after testimony was taken in disciplinary hearing, attorney was deprived of due process). See also Florida Bar v. Price, 478 So.2d 812 (Fla. 1985)(rejecting 'for due process reasons' referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding. We recede from any language in prior opinions that may support a contrary result. See, e.g., Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

7. Where even the court which originally disciplined Mr. Solomon has repudiated the precedents under which it disciplined him for charges not alleged in the original complaint, there can be no reason for New York to discipline him on the same improper grounds.

/s/
VITO J. TITONE

APPENDIX H

NEW HAMPSHIRE
The Union Lead & SUNDAY NEWS

Editorials – October 8, 2000

Why Brock must go:
Senators must restore faith in system

Senators are not in the final phase of the impeachment process. They are reviewing the evidence and searching their souls.

The task before them is not an easy one; yet they have an obligation not only to the citizens of this state, but to generations to come. Their duty is to restore faith in the justice system, and, more broadly, to demonstrate that ours is not a government of the elite.

Their duty is to convict the chief justice and remove him from office.

If they fail to do so, the people will rightfully be suspicious of the ethical integrity of the Supreme Court and of the Senate itself. If Brock walks, the message is that the good old boy system is alive and well in the Granite State. That the powerful take care of each other. That some are "more equal" than others.

David Brock may be a fine family man; he may have a long history of good service to the state.

But he has erred seriously in an area that is simply unacceptable, especially for a man of his station. Simply put, he is ethically flawed.

See him walking into Howard Zibel's office to try to cancel the appointment of Judge Pappagianis to the Thayer divorce panel. Not only did he listen to Thayer's objections, he tried to act on them.

That's enough right there to see that Brock is not fit to serve.

But even if one could overlook such a serious "lapse," how does one explain lying under oath? Brock now admits that he was not straight with the House investigators. He claims that he lied because of concern about revealing confidential court information. This is the chief justice of the supreme court. Under oath. The truth, the whole truth and nothing but the truth.

All he had to do is say, "I can't answer that question." He did not have to lie and mislead. If the chief justice of the supreme court cannot fathom that simple bit of ethics, he has no place on the bench.

The burden before the Senate now is not be a pleasant one. No one can be happy to see a man's career come to an end. But this is a case not about a man, but an institution. And the Supreme Court must be cleansed.

The Senators will find no joy in convicting and removing this man from office. But in doing so, they can be proud that they did their duty; that they restored integrity to the justice system, and preserved it in the Senate.

APPENDIX I

[Letter sent to 22 Senators from David Solomon]

The Question Before The Senate Is If Removal From Office Is Required.

The Senate does not have to decide whether Chief Justice Brock initiated *ex parte communication* with a party-litigant. He *admitted* his guilt to initiating *ex parte communication.* He told Justice Thayer of Judge Pappagianis' appointment. He said he was sorry for his "mistake". But as *Chief Justice* of New Hampshire's judiciary, he *committed* and *admitted* his guilt to initiating *ex parte communication.* Whether a response was "solicited" is irrelevant. What is relevant is that he initiated *ex parte communication.* More troubling, and not charged, was that the *Chief Justice* interfered, albeit unsuccessfully, in the appointment of Judge Pappagianis based on the ex parte objections of a party-litigant. Clerk Zibel's concern over the *Chief Justice's* favoritism to one party-litigant brought this to the House and Senate. Unfortunately, the "Zibel Memo", and not the Court's sense of duty, brought this before you, and ended the practice of recused Justices influencing cases in which they had an interest or conflict. The Court's decision not to disclose the *ex parte communication* until the Zibel Memo shows the inability of judges to judge judges. Senator, please rise to the opportunity given to you by Clerk Zibel's courage to come forward. The Chief Justice's initiating *Ex Parte Communication* with a party-litigant is grounds for removal from office, even if

the Chief Justice is now sorry and admits his "mistake". This admission was unlikely without the Zibel Memo. Your courage will improve the quality of justice in every courtroom in our country because there is no deterrent without punishment. All judges must fear removal from office as certain penalty for initiating *ex parte communication.* To excuse *admitted ex parte communication* because it was claimed to be unintended invites *ex parte communication* by all judges. Judges will now be more careful, but if caught they will claim it was unintentional and be excused from accountability and responsibility like *Chief Justice* Brock.

The Senate does not have to decide whether Chief Justice Brock committed *perjury* to the legislature. He *admitted* his guilt to *perjury* to the legislature. He *admitted* his testimony was not "fully accurate". Again, he asks the Senate to excuse his perjury because of JCC Rule 40 concerns. Sworn testimony cannot have exceptions. There is no deterrent without punishment. All judges must fear removal from office as certain penalty for *perjury.* To excuse *admitted perjury* because of JCC Rule 40 concerns invites *perjury* by all judges. Judges will be more careful, but if caught they will claim some rule to excuse perjury and escape accountability and responsibility like *Chief Justice* Brock. Non-judges will justify perjury based on the *Chief Justice's* example. The Chief Justice and his counsel could have advised the House, off the record, of their JCC Rule 40

concerns. There is no excuse for perjury by the *Chief Justice*—the model for judicial conduct.

The Senate does not have to decide whether Chief Justice Brock called Judge Gray. The JCC decided he did. Assuming he only called the clerk, he *admitted* he realized the "appearance of impropriety". With all the people in the Court, someone else could have called.

You do not become Chief Justice unless you are an outstanding jurist. The problem is not with Chief Justice Brock. The problem is the judiciary's inability to police itself. This flawed system invites abuse of judicial power. It is unfortunate that a good man must be accountable and responsible for his *admitted ex parte communication* and *perjury*. If his *admitted ex parte communication* and *perjury* are excused, all judges will reasonably conclude they can do it too. The questions is not how high is the bar, the question is how *low* is the bar. G-d be with you.

APPENDIX J

THE WALL STREET JOURNAL

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FRONT PAGE

Tort Reform Test

Overhaul of Civil Law In Colorado Produces Quite Mixed Results

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Frivolous Litigants Win Less, But Some Real Victims Are Not Made Whole

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Insurers Who Left Return

By Milo Geyelin
Staff Reporter of THE WALL STREET JOURNAL

DENVER – everyone talks about legal reform, but Colorado has bet the ranch on it.

State laws here protect ski resorts and dude ranches from lawsuits over accidental injuries. Bars are virtually immune from legal blame for the acts of drunk patrons. Jury awards for pain

and suffering top out at $250,000. And defendants can't be forced to ante up more in damages just because they have the deepest pockets.

Some of Vice President Dan Quayle's most controversial proposals to overhaul the civil justice system have found a testing ground here. Shocked by soaring commercial and municipal insurance rates, Colorado began reforming its civil system six year ago. Though many states have enacted law to limit civil suits and damage awards, none has done more than Colorado.

The idea was to make insurance more available, knock down premiums and give businesses a breather from costly litigation. More than that, reformers wanted to redress what they perceived as an injustice: the prevalence of unpredictable and often unjustified jury awards spurred on by avaricious lawyers working for contingency fees.

Mixed Bag

So what's the verdict? Insurance companies that fled Colorado in droves in the mid-1980s, blaming lawyers and high jury awards, have come back, bringing with them increased competition. Limits on damages have helped lower insurance companies' payouts, leading to some drops in insurance rates. Lawsuits of dubious merit are filed less frequently now because they are harder to prove. Defendants seem less inclined to settle out of court just to avoid the nuisance and risk of litigating.

But, to the dismay even of some reformers, that's not the entire story. Commercial insurance premiums have gone down much less than the business community anticipated. Auto insurance, the major insurance cost for consumers, is actually more expensive than it was before the legal reforms were passed.

Frivolous suits are less likely to reap big awards, but so are lawsuits that nearly anyone would consider valid. Cases involving catastrophic injury to the plaintiff and egregious wrongdoing by the defendant are highlighting the flip side of reform: The most seriously hurt are most likely to see their damages reduced the most under the new laws.

Roxie Lypp's Dilemma

A propane gas explosion in the mountain resort of Crested Butte in March 1990 illustrates some of the unexpected problems with legal reform. Investigators found that the gas supplier, Salgas Inc., had violated more than a dozen state safety regulations. Three people were killed, and 14 were injured. One of the injured, Roxie Lypps, a former teacher and part-time bank employee, was buried beneath bricks and debris and had severe burns over 40% of her body. After two years of painful burn therapy and skin grafts, Ms. Lypps is still unable to work full time and faces an increased risk of skin cancer.

A Denver state court jury awarded Ms. Lypps $1.5 million last November. Of that amount, $486,000 was for punitive damages intended to punish Salgas and its parent, Empire Gas Co. of Lebanon, Mo., for negligence. The rest was compensation for injuries. But in December, a judge was force to reduce the total amount by more than half. One reason: The jury's award of $600,000 for pain and suffering was over the state limit of $250,000.

That reduced Ms. Lypp's compensatory damages to $621,642. Then another Colorado law came into play: Individual defendants in civil suits can't be force to pay more than their share of the blame when others at fault have no money. In this case, Empire and Salgas blamed the blast on a repair two previous owners had made. The previous owners were out of business and uninsured. But the jurors weren't told this because another Colorado law prohibits lawyers from disclosing whether defendants have insurance. When the jury divided blame equally among all four companies, the net effect was to cut Ms. Lypp's remaining compensation to $310,822.

'Victims Again'

That, in turn, knocked down the punitive damages because Colorado law prohibits juries from assessing more in damages to punish wrongdoers than they award to compensate victims. Ultimately, Ms. Lypps expects to receive a total of

about $316,000 after all her legal fees and other expenses are deducted.

"I'm well beyond [concern over] the money," says Ms. Lypps, 47 years old. "But the court system should allow the jury to award what they feel is fair. . . . To me it's totally unfair. We end up being the victims again."

In cases of serious injuries such as hers, what remains may not be enough to pay for medical care and rehabilitation. Because defendants and their insurers are now insulated from huge damages, costs are transferred to state and federally funded health programs when victims' insurance limits run out.

In Longmont, Colo., seven-year-old Leah Speaks has been in a permanent coma since last May, when her mother was killed and her sister badly injured by an uninsured drunk driver coming from a bar. The driver had knocked back five beers and six whiskey shots, enough in many states to have the bar held legally responsible for the accident.

But in Colorado, damages against bars that serve customers too much to drink are limited to $150,000 and apply only if the bartender acted willfully. The bar in this case settled out of court for the full amount. But it was hardly enough to pay for a lifetime of medical and nursing care. Federal Medicaid and disability payments are al-

ready footing the bill, says Leah's aunt and guardian, Roberta Gies.

Leah Speaks and Roxie Lypps weren't they kind of victims legal-reform advocates had in mind when they began overhauling the state's civil justice system in 1986. The reformers were aiming at cases such as the one involving Oscar Whitlock, a University of Denver student who became paralyzed in a trampoline accident during a fraternity party.

Mr. Whitlock blamed the university for not supervising the fraternity, and in 1985 an appeals court upheld a jury award of $5.3 million. Though ultimately overturned, decisions like this offended basic beliefs here that individuals must bear responsibility for their own risks.

Such multimillion-dollar jury awards for seemingly meritless lawsuits also were being blamed for Colorado's deepening insurance crisis. Insurers said they could no longer accurately predict risk. Throughout the state, thousands of commercial and municipal liability policies suddenly were canceled in 1985. Rates and deductibles were soaring for other businesses and professions, whole coverage declined. Rural physicians stopped delivering babies when rates for doctors who performed obstetric procedures doubled.

Dude ranches accustomed to paying $20 a year per horse for liability coverage were suddenly paying $400. Bars and restaurants saw rate in-

creases of 600%. "A lot of my friends went bare," says John Ziegler, owner of Jackson's Hole Sports-Grill in Denver.

Underestimating Risk

Nearly half of Colorado's municipalities had their policies canceled or faced major restrictions. Even cities with excellent risk records felt the brunt. "Basically, there was no reason," say Darrell Barnes, risk manager for Colorado Springs, which had its $5 million liability policy canceled in September 1985. "Our claims never exceeded our premiums."

The problem was national, but Colorado seemed particularly hard hit. Some carriers, blaming lawyers, pulled out of the state altogether. Business groups and insurers banded together to urge reform. "If someone breaks into your house," Aetna Life & Casualty Co. warned in a full-page ad in Denver's Rocky Mountain News, "better hope they don't break a leg. Lawsuit abuse is out of control."

The extent to which lawsuits actually were to blame remains in dispute. Some state officials question whether there really was an insurance crisis. Colorado is among 18 states that filed an antitrust suite in 1988 against more than two dozen insurers. The suit alleged an industry conspiracy to pull out of the commercial and municipal liability market to limit exposure after years of risky underwriting.

Insurance companies deny the charges and are vigorously contesting the suit. But former Colorado insurance commissioner John Kezer says that at least part of the industry's crisis was self-inflicted. For years, insurers had been underpricing policies and "low-balling" risk to grab premium dollars and invest at record-high interest rates, he says. When those rates tumbled in 1985, the industry's cash surplus shrank. A nationwide contraction in insurance availability ensued, coinciding with a rise in claims.

68 Laws in Six Years

Unpredictable jury awards exacerbated the problem, increasing pressure on defendants to settle cases, says former University of Denver law school dean Edward A. Dauer, chairman of a task force that investigated the crisis. Colorado was not experiencing a "litigation explosion," he says, but the insurance industry "needed predictability in risk."

Legal reform became the clarion call, and Colorado's conservative, business-oriented legislature swiftly embraced it. Legislators enacted 68 laws over six years.

Lawyers became more reluctant to bring difficult-to-prove cases. Juries and judges became more skeptical of injury claims and angry about lawsuit abuse. "Juries who sit on auto-accident cases see themselves as more likely the victim of

a lawsuit than the victim of an accident," says William Keating, a Denver plaintiffs' lawyer.

Injury cases, as a result, have become more expensive to pursue and difficult to prove, says another plaintiffs' lawyer, Gerald McDermott. "That in and of itself is going to result in some cases that have some merit not being pursued," he argues. For cases involving less than catastrophic injuries, jury verdicts and settlements have dropped.

Some Rates Drop

The laws have most directly helped professions and businesses that were singled out for special protection. Malpractice rates at physician-owned COPIC Insurance Co., Colorado's largest medical malpractice insurer, have dropped 17% since 1988, the year Colorado overhauled its malpractice law to limit liability and damages for doctors.

But, in general, the overall impact on the insurance policyholder has not been great. The insurers have benefited more than individual consumers. Industry losses over the past six years have fallen 30%, while general commercial liability premiums have dropped only 9% overall, according to A.M. Best Co., an independent data gatherer.

At Breiner Construction Co., a small contractor in Denver, commercial liability rates dropped 15% in 1990-the first drop after six years of increases.

"It has come down," says Breiner's president, Rosemary Breiner, "but not as much as it went up."

State regulators haven't been able to determine the impact that legal reform has had on lowering insurance rates because commercial insurers don't have to reveal this information in public disclosures. Moreover, Colorado has benefited from an upswing nationally in the insurance industry's business cycle. That alone was largely responsible for bringing back insurers to the state, regulators say.

Meanwhile, automobile insurance rates, a major bone of contention with Colorado residents, have continued to rise steadily. Between 1988 and 1990, rates rose 8% on the average, nationwide. But in Colorado, they rose 9.2% in the same period. "That's what's creating some animosity on the part of myself and some other," grouses Assistant Senate Majority Leader Ray Powers, a conservative Republican who, like some other powerful legislators, is having second thoughts about continued reform efforts.

Highly publicized accidents such as the one at Crested Butte and another at Berthoud Pass, near Denver, are contributing to legislators' caution. In the Berthoud Pass incident, a state road worker clearing fallen rock from the pass shoved a 6.7-ton boulder down the mountain in 1987, thinking it would roll just a few feet. The rock

crashed into a tour bus 725 feet below, killing eight and injuring 25.

One tourist, Marcus Lang, who was blinded and brain-damaged, lingered in Denver General Hospital for almost a year before he went home to West Germany and died. Under Colorado's governmental immunity law, toughened in 1986 and upheld by the Colorado Supreme Court last month, the state's total liability for all the victims combined couldn't exceed $400,000. Mr. Lang's medical bills alone exceeded $328,000. (Mr. Lang's estate hasn't received anything as yet from Colorado because the case is still being litigated.)

Many Colorado residents were appalled. "I think we did need legal reform, but now the pendulum has begun to swing back, so the person who needs compensation can get it," says Republican House Majority Leader Scott McInnis, an early reform supporter who now is backing off.

One bill he is backing this year would increase the potential liability of government entities. Another would create an office of consumer advocate to more aggressively challenge insurance-industry rate requests. Continued legal reform also now faces a more skeptical legislature, say Republican House Speaker Chuck Berry.

Opposition is stiff for a bill the river rafting industry is pushing to protect itself against suits stemming from whitewater accidents, including "getting lost or failing to return." There is also lit-

tle enthusiasm for a law auto insurers are pushing to reduce the minimum insurance coverage required in Colorado. Auto insurers are also promoting a companion bill to limit accident victims' ability to sue over injuries.

Two years ago, identical auto-insurance proposals were under debate when Dorothy Powers, the wife of the assistant Senate majority leader, showed up in the state capitol to lobby in opposition. Encased in a body cast to fuse her own fractured spine from an auto accident, Mrs. Powers, 60 years old, sat before a hearing committee and held up her hospital X-rays. "I never thought that this could happen to me, " she said. "Now I know it can happen to any one of you, to anyone in this room, at any given time."

Not surprisingly, says Mr. McInnis, both bills died. "This was closer to home," he says. "Everybody on that committee knew her."

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No. 00-1209

In the Supreme Court of the United States

OCTOBER TERM, 2000

DAVID LAWRENCE SOLOMON,

Petitioner,

–v.–

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: February 1, 2001

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COUNTER-QUESTION PRESENTED FOR REVIEW

Whether an attorney may be subject to reciprocal discipline by the Appellate Division of the Supreme Court of the State of New York, Second Department, for conduct for which the attorney was previously disciplined by the Supreme Court of Florida?

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STATEMENT OF THE CASE

David Laurence Solomon (hereinafter referred to as "Petitioner") was suspended from the practice of law for a period of ninety-one days by the Order of the Supreme Court of Florida, dated February 26, 1998 (Pet. App. D).

The Grievance Committee For The Tenth Judicial District (hereinafter referred to as "Respondent") served a Notice and Application Pursuant to N.Y.C.R.R. 691.3 of the Rules Governing the Conduct of Attorneys, dated June 23, 1998, seeking reciprocal discipline by the Appellate Division, Second Department. Petitioner was advised of his rights pursuant to 22

N.Y.C.R.R. 691.3 to file within twenty days of service of the Notice, a verified statement setting forth any defense to the imposition of discipline as enumerated in subdivision (c) of 691.3 as follows:

1) That the procedure in the foreign judgment was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or

2) That there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duties, accept as final, the finding of the Court in the foreign judgment as to the attorney's misconduct, or

3) That the imposition of discipline by the Court would be unjust.

Petitioner demanded a hearing pursuant to his rights under 22 N.Y.C.R.R. 691.3(d). A hearing was conducted on May 4, 1999, at the offices of Respondent. At that hearing, Petitioner presented two witnesses who testified regarding the severity of discipline imposed by the Supreme Court of Florida. The Special Referee, John E. Mulholland, filed a report after the conclusion of the hearing, which found that Petitioner did not establish the defense claimed in his verified answer under 22 N.Y.C.R.R. 691.3 (Pet. App. C).

By Order dated February 7, 2000, the Appellate Division of the Supreme Court of the State of New York, Second Department, confirmed the findings of the Special Referee and suspended Petitioner for a period of one year, and conditioned his reinstatement in New York upon his reinstatement in Florida. (Pet. App. 2a).

The New York State Court of Appeals, by Order dated October 26, 2000, rejected Petitioner's Motion for Leave to Appeal (Pet. App. A).

REASONS TO DENY WRIT

Petitioner has received reciprocal discipline by the Appellate Division of the Supreme Court of the State of New York, Second Department, after being offered due process pursuant to the Rules of the Appellate Division, Second Department, Sec. 691.3(a) in that Petitioner demanded and received a hearing to present his defenses to reciprocal discipline. It was Petitioner's burden at such a hearing to present his defenses to the Special Referee. Rather than present defenses, Petitioner chose to present two witnesses who testified regarding the severity of the sanctions. Therefore, the Special Referee properly held that Petitioner had not established his defenses and the Appellate Division, Second Department sustained those findings after their review and imposed discipline. The claims made by Petitioner before this Court appear to be based on a footnote allegedly contained in the advance sheets of an unrelated case *Florida Bar v. Vernell,* 721 So.2d 705 (Fla. 1998) that neither mentions *Florida Bar v. Solomon,* 711 So.2d 1141 (Fla. 1998) nor appeared in the official report. Petitioner offers his own self-serving speculation as to why the footnote was omitted. However, none of his claims have anything to do with his failure to present defenses at the hearing, which he demanded and received. Rather, this is Petitioner's latest attempt to re-litigate *Florida Bar. v. Solomon,* 711 So.2d 1141 (Fla. 1998).

ARGUMENT

POINT I

RECIPROCAL DISCIPLINE WAS PROPERLY IMPOSED BY THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Based upon all the evidence presented to the Court, the Appellate Division, Second Department rendered a decision imposing discipline upon Petitioner by Order dated February 7, 2000. The Appellate Division did not abuse its discretion inasmuch as the licensing and supervisory power over attorneys is vested exclusively within the Appellate Divisions (22 N.Y.C.R.R. 691). The Appellate Division, Second Department granted Petitioner's demand for a hearing and afforded him the opportunity to prove his defenses pursuant to the Rules of the Appellate Division, Second Department. Sec 691.3(c). The Petitioner failed to establish his defenses at the hearing.

Petitioner has already sought review of his claimed constitutional violations by the Florida Supreme Court before this Honorable Court in a prior Writ of Certiorari and the Certiorari was denied. *Solomon v. Florida Bar,* ____ U.S. ____ (1998), 119 S.Ct 411.

CONCLUSION

A disciplinary sanction was imposed by the Appellate Division, Second Department after Petitioner was afforded a full hearing in this matter in addition to the submission of memoranda and various motion practice. The maintenance of the honor and integrity of the profession warrant that Petitioner's sanctions remain in place.

The Petition for a Writ of Certiorari should be denied.

Dated: Syosset, New York
February 1, 2001

Respectfully Submitted,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF AND RULE 11 MOTION

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MISCELLANEOUS:

Stern and Gressman's *Supreme Court Practice,* Seventh Edition 9

REPLY BRIEF AND RULE 11 MOTION

I. Key Facts On The Testimony And Evidence Were Omitted By The Brief In Opposition To Mislead This Court To An Erroneous Conclusion. This Shows How Judicial Staff Enable The Spread of Unconstitutional Abuse of Judicial Power In The States Highest Courts.

Key facts on the testimony and evidence were omitted by the brief in opposition to mislead this Court to an erroneous conclusion. This shows how judicial staff cooperate to defend and enable the spread of unconstitutional abuse of judicial power[1] in the states highest courts flowing from *Solomon*[2]. Judicial staff must insist *Solomon* be checked in accord with the law of the constitution as applied in *Ruffalo*[3], section 691[4],

---

[1] The attorney was found innocent of *all* of the nearly *one thousand* charges by the factual findings and *suspended indefinitely* anyway. Former Judges of the highest courts of Florida and New York testified the suspension violated the constitution. Florida's highest court admitted in writing that the suspension violated the constitution 85 days after it denied rehearing. Despite these facts, Florida's highest court remains unwilling to vacate the suspension that it admitted violates the constitution.

[2] *Florida Bar v. Solomon*, 711 So.2d 1141 (Fla.1998).

[3] *In re Ruffalo*, 390 U.S. 544 (1968).

[4] N.Y.C.R.R. Section 691.

Pulliam[5], and section 1983[6]. In contrast, New Hampshire Supreme Court Clerk Zibel refused to cooperate and enable unconstitutional abuse of judicial power by his state's highest court. Clerk Zibel's honor and courage caused the impeachment of New Hampshire Chief Justice Brock and immediate judicial reforms. One reform before the New Hampshire Legislature is an administrative agency that is not controlled by judges to police the *state's highest court in particular* and judiciary in general. A state's highest court in particular, and a state's judiciary in general are often unwilling to self police judges on the *state's highest court in particular.* The unusual procedural posture of this case shows that judges on one state's highest court are also often unwilling to self police judges on a different state's highest court in the rare circumstances when that is possible.

Honorable judicial staff do as Clerk Zibel did, and insist that unconstitutional abuse of judicial power by judges on the states highest courts be checked in accord with the law, and do not cooperate to defend and enable unconstitutional abuse of judicial power by chief justices and justices on the states highest courts. Judicial staff who cooperate to defend and enable unconstitutional abuse of judicial power by chief justices and justices on the states highest courts unwittingly join this affront to our honorable judiciary and its place in our democracy.

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[5] *Pulliam v. Allen,* 466 U.S. 522 (1984).

[6] 42 U.S.C. 1983.

Solomon was an unconstitutional abuse of judicial power by judges on Florida's highest court. The law of the constitution as applied in *Ruffalo,* section 691, *Pulliam,* and section 1983 was intended to remedy unconstitutional abuse of judicial power, even by judges on the states highest courts. Fellow judges in Florida, New York and the District of Columbia enable the spread of the unconstitutional abuse of judicial power by fellow judges on Florida's highest court flowing from *Solomon* when they do not insist *Solomon* be checked in accord with the law. The petition's one reason to grant certiorari is to prove laws where judges self police fellow judges on *the states highest courts in particular,* are viable. These laws are viable only if *this Court* is willing to self police fellow judges on the highest courts of Florida and New York, when fellow judges on the highest courts of Florida, New York and the District of Columbia were unwilling to do so. Conversely, if this Court declines certiorari, it will have proven laws where judges self police fellow judges on the states highest courts in particular, are not viable. Certiorari denied invites Congress, state legislatures and voter referendums to create an administrative agency not controlled by this Court, the states highest courts in particular, or the judiciary in general, to police the states highest courts in particular and judiciary in general. If this Court is unwilling to stop the spread of unconstitutional abuse of judicial power by the states highest courts in particular, and the judiciary in general, perhaps an agency not controlled by judges can to do so.

The brief in opposition does not address the one reason given to grant certiorari. The section 691 defenses are the tests applied in New York to a foreign judgment to determine whether a foreign judgment violated the constitution. The brief in opposition quoted the section 691 defenses. The brief in opposition then omitted key facts on the testimony and evidence to mislead this Court to conclude that no section 691 defenses were raised or proven. The section 691 defenses that determine whether a foreign judgment violated the constitution are whether guilt in the foreign judgment was based on,

> (1) a procedure that lacked constitutional notice of the charges, *or*
>
> (2) infirm proof.

Solomon held[7] that guilt based on matters that were never charged *did* provide constitutional notice of the charges. The brief in opposition did not discuss or defend *Solomon's* holding. The New York record included *Solomon's* holding. The brief in opposition misleadingly concluded *only because it omitted key facts,* that section 691 defenses were not raised or proven. Rule 11 is fairly

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[7] Please see page 23a of the petition where *Solomon* held,

> Solomon contends that the referee violated his due process rights by recommending that he be found guilty of specific instances of misconduct that were *not charged* in the Bar's complaint. *We disagree.* [emphasis supplied].

imposed when key facts are omitted to mislead this Court to an erroneous conclusion.

II. Clear Conflict With *Ruffalo*.

Even with no testimony and no evidence, Solomon's clear conflict with Ruffalo established the section 691 defense of a lack of constitutional notice of the charges. In 1968, *Ruffalo* held that guilt based on matters that were never charged did *not* provide constitutional notice of the charges. In 1998, *Solomon* held exactly the opposite, that guilt based on matters that were never charged *did* provide constitutional notice of the charges. In 2000, the law required New York's highest court to apply the section 691 defenses to *Solomon*. New York's highest court chose not to obey the law. There is no other way to explain how New York's highest court held the notice *was* constitutional in *Solomon*. Furthermore, the New York referee's report stated that the unopposed expert *testimony* by former judges of the highest courts of Florida and New York was that *Solomon* violated the constitution because guilt was based on matters never charged *and* on infirm proof. The New York referee's report reprinted on page 9a of the petition summarized former Supreme Court of Florida Justice Karl's testimony as follows,

> It was his opinion that . . . the [Florida] Supreme Court made findings of guilt and asserted punishment for matters that were not properly charged by the bar, and that there

> [*sic*] two findings of guilt not supported by the evidence.

The New York referee's report reprinted on page 10a of the petition quoted former New York Court of Appeals Judge Titone's testimony as follows,

> "First of all, I don't thing he had notice . . . I don't think he ever had notice of what they were doing."

The New York referee's report reprinted on page 8a of the petition stated that the 1998 petitions for a writ of certiorari and rehearing filed in this Court[8] were admitted in *evidence* with no objection in the New York hearing. These two 1998 documents discussed in detail that *Solomon* violated the constitution because of (1) an admitted lack of notice of the charges and (2) *all* guilt was based on infirm proof. Please see this 2001 petition, page 11, footnote 11, for a detailed analysis of the New York referee's report.

The brief in opposition misleads this Court because it omitted the key fact that there *was* testimony and evidence on the section 691 defenses. This omitted key fact misleads this Court because this incomplete factual statement misleadingly suggests that there was *no* testimony and *no* evidence on the section 691 defenses. Based on this incomplete statement of the facts, the brief in opposition misleads this Court when it misrepresented that the referee *properly* held that section 691 defenses were not established

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[8] *Solomon v. Florida Bar*, ___ U.S. ___ (1998), 119 S.Ct. 411, USSC case number 98-425.

because[9] there was testimony on the severity of the sanctions. Page three misstated by omission, the testimony, as follows,

> Petitioner chose to present two witnesses who testified regarding the severity of the sanctions. Therefore, the Special Referee properly held that Petitioner had not established his defenses . . .

The brief in opposition misleads this Court when it misstated that the *evidence* did not establish section 691 defenses. This misstatement by omission of key facts misleads this Court because it misleadingly suggests there was *no evidence* on the section 691 defenses. Page four misstated by omission, the evidence, as follows,

> Based on all the *evidence* presented to the Court, the Appellate Division, Second Department rendered a decision imposing discipline. . . . The Petitioner failed to establish his defenses at the hearing. [emphasis supplied].

The New York referee's report stated in the "Hearing" section of the report that there *was* unopposed expert *testimony* by former judges of the highest courts of Florida and New York on the section 691 defenses. The New York referee's report stated in the "Hearing" section of the report that there *was evidence* on the section 691 de-

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[9] The brief in opposition in the middle of page 3 uses the word, "Therefore".

fenses admitted with no objection. It is true that on this record, New York's highest court held the procedure in *Solomon* did provide constitutional notice, and the guilt was not based on infirm proof. This was an unconstitutional abuse of judicial power by New York's highest court to enable the spread of the unconstitutional abuse of judicial power by fellow judges on Florida's highest court. The question presented is whether this Court will grant certiorari to stop the spread of unconstitutional abuse of judicial power by fellow judges on the highest courts of Florida and New York that is flowing from *Solomon*, or decline certiorari to increase the spread of the unconstitutional abuse of judicial power by fellow judges on the highest courts of Florida and New York flowing from *Solomon* . If these four judiciaries--the highest courts of the U.S., Florida, New York and the District of Columbia-- are unwilling to use existing law to stop the spread of unconstitutional abuse of judicial power by fellow judges on the states highest courts flowing from *Solomon*, perhaps an administrative agency to police judges that is not controlled by judges will be created by Congress, state legislatures or voter referendums to stop the spread of unconstitutional abuse of judicial power by judges on the states highest courts flowing from *Solomon*.

III. Stern & Gressman's *Supreme Court Practice* Stated The *Clear Conflict* Standard For Opposing Briefs.

Solomon and New York's highest court held that *Solomon* was constitutional. These holdings

by the highest courts of Florida and New York are in *clear conflict* with *Ruffalo.* Stern and Gressman's *Supreme Court Practice,* Seventh Edition, in "The Opposing Brief" section stated a *clear conflict* standard for opposing briefs filed in this Court. Page 375 stated,

> Where there is a *clear conflict* of decisions, or where the question is undoubtedly of such importance as to need a Supreme Court determination, the respondent may have *no reasonable basis for opposing certiorari.* [emphasis supplied].

An *entire section* in this 2001 petition discussed the *clear conflict* between *Ruffalo, Solomon* and New York's highest court's holding that *Solomon* was constitutional. The brief in opposition's table of citations did not list *Ruffalo* because even the brief in opposition could not contrive to deny *clear conflict* between *Ruffalo, Solomon,* and New York's highest court's holding that *Solomon* was constitutional.

CONCLUSION

Rule 11 sanctions are fairly imposed because, (1) key facts on the testimony and evidence were omitted from the brief in opposition to mislead this Court to an erroneous conclusion, and (2) Stern & Gressman's *clear conflict* standard was violated. Key facts omitted from the brief in opposition show the willingness of judicial staff to defend and enable the spread of the unconstitu-

tional abuse of judicial power by the states highest courts flowing from *Solomon*. Judicial staff must insist that *Solomon* be checked in accord with the law. Certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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